Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The
Supreme Court of The United States
October Term 1996

DAVID M. MUMFORD,
Petitioner,

v.

DAVID A. BASINSKI,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
WITH APPENDIX FILED UNDER SEPARATE VOLUME

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QUESTIONS PRESENTED FOR REVIEW

#1 Whether, consistent with this Court's holdings in *Branti v. Finkel*, 455 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574, *Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729 (1990) and *O'Hare Truck Service, Inc. v. City of Northlake*, 116 S.Ct. 2353 (1996), and in direct conflict with decisions from this Court and from other Circuits, the Sixth Circuit erred in holding that a government position was inherently political as a matter of law, when the Defendants admit and all the facts demonstrate that political affiliation was not an appropriate requirement for the position?

#2 Whether, under *McMillian v. Monroe County, Alabama*, 65 L.W. 4403 (1997), a county is liable for the administrative acts of an administrative judge for a county common pleas court acting in the particular area or issue regarding employment decisions for a local government?

PARTIES TO THE PROCEEDING

Petitioner is David M. Mumford, an individual who was terminated from his position as a domestic relations court referee in Lorain County, Ohio.

Defendant originally was Joseph C. Zieba, in his individual and official capacities, but David A. Basinski was substituted, in his official capacity, when he replaced Joseph Zieba as the Administrative Judge of the Lorain County Domestic Relations Court.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 8

CONCLUSION 30

APPENDICES [Listed under separate table]

TABLE OF AUTHORITIES

U.S. SUPREME COURT CASES

CASES **PAGE(S)**

Branti v. Finkel, 455 U.S. 507,
100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). . . .3, 5, 7, 9, 11,
12, 13, 14, 15, 17,
18, 19, 20, 21, 23

Elrod v. Burns, 427 U.S. 347, 359,
96 S.Ct. 2673, 2683 (1976) . . . 9, 11, 12, 13, 14, 18, 21

Ex Parte Young, 209 U.S. 123 (1908) 29

Green v. Mansour, 474 U.S. 64, 68,
88 L.Ed.2d 371, 106 S.Ct. 423, 426 (1985) 29

Jett v. Dallas Independent School District,
109 S.Ct. 2702 (1989) 24

McMillian v. Monroe County, Alabama,
65 L.W. 4403 (1997) 8, 10, 24, 25, 26, 27, 29, 30

O'Hare Truck Service, Inc. v. City of Northlake,
116 S.Ct. 2353 (1996) 11, 19

Rutan v. Republican Party of Illinois,
110 S.Ct. 2729 (1990) 9, 11, 12, 18, 19, 23

U.S. COURTS OF APPEALS CASES

PAGE(S)

Balogh v. Charron, 855 F.2d 356
(6th Cir., 1988) 16

Barrett v. Thomas, 649 F.2d 1193
(5th Cir., 1981) 16

Bauer v. Bosley, 802 F.2d 1058, 1062
(8th Cir., 1986) 13

Burns v. County of Cambria, Pa., 971 F.2d
1015 (3rd Cir. 1992) 16

Davis v. Ector County, Tex., 40 F.3d 777,
784 (5th Cir., 1994) 27

Dickeson v. Quarberg, 844 F.2d 1435
(10th Cir., 1988) 16

Dimming v. Wahl, 983 F.2d 86
(7th Cir., 1993) 16

Eggar v. City of Livingston, 40 F.3d
312, 315 (9th Cir., 1994) 28

Familias Unidas v. Briscoe, 619 F.2d 391, 404
(5th Cir., 1980) 26

PAGE(S)

Faughender v. City of North Olmsted, 927 F.2d 909, 913-14 (6th Cir.1991) 3

Harter v. Vernon, 101 F. 3d 334, 342 (4th Cir., 1996) 27

Horton v. Taylor, 767 F.2d 471, 478 (8th Cir. 1985) 13, 15

Jones v. Dodson, 727 F.2d 1329 (4th Cir., 1984) 16

Lohorn v. Michal, 913 F.2d 327, 335 (7th Cir., 1990) 14

Lucas v. O'Loughlin, 831 F.2d 232, 234-235 (11th Cir., 1987) 27

Matlock v. Barnes, 932 F.2d 658, 663 (7th Cir., 1991) 14

Meeks v. Grimes, 779 F.2d 417 (7th Cir. 1985) 9, 14, 16, 17, 21, 23

PAGE(S)

Parker v. Williams, 862 F.2d 1471, 1479
(11th Cir., 1989) 27

Rodriguez-Burgos v. Electric Energy Authority,
853 F.2d 31, 37 (1st Cir., 1988) 14

Roldan-Plumey v. Cerezo-Suarez, 115 F.3d 58
(1st Cir. 1997) 9, 16, 22, 23

Soderbeck v. Burnett County, Wisconsin, 752 F.2d
285, 288-289 (7th Cir., 1985) 3, 7, 14

Stott v. Haworth, 916 F.2d 134, 145
(4th Cir., 1990) 14

Tavano v. County of Niagra, 800 F.2d 1128
(2nd Cir., 1986) 15

Terry v. Cook, 866 F.2d 373, 377-378
(11th Cir., 1989) 15, 16

Upton v. Thompson, 930 F.2d 1209
(7th Cir., 1991) 16

Van Ooteghem v. Gray, 774 F.2d 1332, 1337
(5th Cir., 1985) 28

PAGE(S)

Mendez-Palou v. Rohena-Betancourt, 813 F.2d 1255, 1258 (1st Cir. 1987) 13, 14

Mumford v. Zieba, 4 F.3d 429, 435 (6th Cir. 1993) 1, 4

Mumford v. Basinski, 105 F.3d 264 (6th Cir., 1997) 1, 8, 13, 16

McBee v. Jim Hogg County, Texas, 730 F.2d 1009 (5th Cir., 1984) 16

Nekolny v. Painter, 653 F.2d 1164, 1169 (7th Cir., 1981) 14

Ness v. Marshall, 660 F.2d 517, 522 (3rd Cir., 1981) 13, 15

Owens v. Fulton County, 877 F.2d 947, 952 (11th Cir., 1989) 28

PAGE(S)

Zold v. Township of Mantua, 935 F.2d 633, 635
(3rd. Cir., 1991) 14

Zorzi v. County of Putnam, 30 F.3d 885, 893
(7th Cir., 1994) 14

U.S. DISTRICT COURT CASES

Mumford v. Zieba, 788 F. Supp. 987
(N.D., Ohio 1992) 1, 4, 7

Mumford v. Basinski, 915 F. Supp. 917
(1995) 1

CONSTITUTIONAL PROVISIONS

First Amendment to the United States
Constitution 1, 6, 8, 9, 11, 17, 18

Eleventh Amendment to the United States
Constitution 5, 8, 10, 24, 29, 30

Fourteenth Amendment to the United States
Constitution 1

STATUTES

42 U.S.C. Section 1983 . . . . . 1, 24, 26, 27, 28

OTHER REFERENCES

Federal Rule of Civil Procedure 52(a) 15

Ohio Rule of Civil Procedure 53 . . . . . 2, 7, 20

Ohio Rule of Civil Procedure 75 . . . . . 2, 7

Ohio Rules of Juvenile Procedure 40 . . . . . 2, 7

Ohio Revised Code Section 2151.13 25

LAW REVIEW ARTICLES

The American University Law Review,
Vol 39:11, Susan Lorde Martin
"A Decade of *Branti* decisions:
A Goverment Officials Guide to
Patronage Dismissals" 13

PETITION FOR WRIT OF CERTIORARI

David M. Mumford respectfully asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case reported at 105 F.3d 264 (6th Cir. 1997).

OPINIONS BELOW

The opinions of the Court of Appeals for the Sixth Circuit are reported at 105 F.3d 264 (6th Cir. 1997) and 4 F.3d 429 (6th Cir. 1993), and are reproduced at Apdx. A, pp. 1-29 and Apdx. F, pp. 1-29. It is the most recent 1997 decision which Petitioner David Mumford now seeks this Court to review.

The opinions of the U.S. District Court for the Northern District of Ohio, Eastern division, are reported at *Mumford v. Zieba*, 788 F. Supp. 987 (N.D., Ohio 1992) and *Mumford v. Basinski*, 915 F. Supp.917 (1995) and are reproduced at Apdx. D, pp. 1-14 and Apdx. E, pp. 1-7.

STATEMENT OF JURISDICTION

Petitioner David M. Mumford is requesting a Writ of Certiorari under 28 USC Section 1254(1) to review the final judgement and order of the United States Court of Appeals for the Sixth Circuit, found at 105 F.3d 264 (6th Cir. 1997)

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the First and Fourteenth Amendments to the United States Constitution, raised via 42 U.S.C. Section 1983.

STATEMENT OF THE CASE

This is a case about the asserted power of an elected government official to terminate the employment of a subordinate because of his political affiliation and beliefs when the elected official had admitted and all the relevant facts demonstrate that political affiliation was not an appropriate requirement for the effective performance of the position involved.

Petitioner David Mumford was employed as a referee in the Lorain County Domestic Relations Court from 1979 to January 2, 1989. Mumford's duties as a matter of fact and as delineated in Rules 53 and 75 of the Ohio Rules of Civil Procedure and Rule 40 of the Ohio Rules of Juvenile Procedure were limited to hearing evidence and making recommendations of findings of fact and conclusions of law to the Court for its final decision.

In 1988, Republican Joseph Zieba ran against incumbent Judge Henry Webber, a Democrat. Mumford supported Webber in his campaign, during the course of which Zieba told Mumford, "don't get caught in the cross-fire." Zieba observed Mumford, a Democrat, distributing campaign literature on behalf of incumbent Democrat Webber. Apdx. D-3.

In the November 1988 election, Republican Zieba defeated incumbent Democrat Webber for the Domestic Relations Court judgeship. A second Domestic Relations Court judge, David Basinski, a Democrat to whom referees such as Mumford

would report to as well as Zieba, was elected at the same time.

On December 22, 1988, administrative judge-elect Zieba[1] notified Mumford that his employment would terminate on January 3, 1989, the day Zieba took office. Zieba had never observed Mumford's work performance. Apdx. D-5. Zieba then appointed two Republicans to replace Mumford as referees reporting to the two Domestic Relations Court Judges. Apdx. D-4.

On December 17, 1990, Mumford filed this action in the U.S. District Court, Northern District of Ohio, pursuant to section 1983, alleging termination from his referee position because of his political activities campaigning for his employer, Judge Webber, and suing Judge Zieba in his individual and official capacities.

On March 31, 1992, the district court denied qualified immunity to Zieba, relying on *Branti v. Finkel*, 455 U.S. 507 (1980), finding that the inquiry whether the position was one for which political affiliation was an appropriate requirement was a question of fact, relying on *Soderbeck v. Burnett County, Wisconsin*, 752 F.2d 285, 288-289 (7th Cir., 1985) and *Faughender v. City of North Olmsted*, 927 F.2d 909, 913-14 (6th

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[1] The administrative judge position, which had ultimate and final power over county employees working for the court, alternated between Judge Zieba, a Republican, and Judge Basinski, a Democrat, on a yearly basis. All referees of the court simultaneously reported to both judges pursuant to the above cited Ohio Rules of Civil and Juvenile Procedure.

Cir.1991). The district court also found the position was not political. Apdx.D, pp. 1-14.

On September 1, 1993, the Court of Appeals reversed the trial court on its denial of qualified immunity and sent this case back to the district court for trial. Apdx. F, pp. 1-18.

On September 28, 1995 after this case had been re-assigned, the district court found that because Zieba had retired and because the new administrative judge, Basinski, a Democrat, had been substituted as the official capacity defendant, the case was moot. Apdx E, pp. 1-7. The district court also found the official capacity entity defendant that remained was Lorain County. Apdx. E-5. This dismissal came after three trial continuances, five years of litigation and twelve days before trial.

On January 23, 1997, the 6th Circuit Court of Appeals filed the instant opinion. Apdx. A, pp. 1-29. On appeal, Mumford successfully convinced the 6th Circuit that the moot-ness ruling was not correct. The Court ruled in the same opinion that the 11th Amendment barred Mumford's complaint, and that as a matter of law the position of court referee was an unpro-tected political position. This ruling was made in spite of Petitioner's objections that the scope of the appeal should have been limited to the solitary finding of mootness. Apdx. H, pp. 1-5 and in spite of the fact that the district Court at 788 F. Supp. 987 (N.D., Ohio 1992) had determined the position was to be protected, an issue not upset by the first Sixth Circuit opinion at 4 F.3d 429 (6th Cir 1993). Defendants never filed a cross-appeal. Apdx. A, pp. 1-29.

On February 6, 1997 Petitioner filed for a Rehearing En Banc. Apdx. B, pp. 1-22, which was denied on March 7, 1997. Apdx. C, p.1-2.

On May 13, 1997, Justice Stevens, extended the time within which to file this Petition for Certiorari to and including August 4, 1997.

Between 1990 and 1997, Petitioner has obtained two district court rulings and two opinions from the Court of Appeals for the Sixth Circuit, and has not yet had his day in court. This alone should underscore the need for clarity in this area. Had Mumford had clarity or had Lorain County had clarity, both could have saved years of time and expense.

The U.S. Court of Appeals for the 6th Circuit, in direct conflict with previous decisions of this Court and decisions from other Circuits, upheld petitioner's termination on the ground that his employment position was inherently political as a matter of law.

This case presents direct conflicts between the Sixth Circuit and this Court and conflicts between the U.S. Courts of Appeals and the Sixth Circuit.

The Sixth Circuit Court of Appeals by their 1993 and 1997 rulings in this case have taken away the right of every employee working for any judge in Ohio to sue them individually or in their official capacity for their unconstitutional administrative personnel actions. The decisions in this case render the constitutional protection of *Branti v. Finkel*, 455 U.S. 507, 519-520 (1980) and its progeny regarding administrative employment matters meaningless.

The instant 1997 decision holds that all actions by judges over county court employees are viewed in Ohio as actions of "state judges", thus allowing 11th amendment protection regardless of the particular area or issue involved.

Mumford seeks certiorari of that portion of the instant

decision that goes beyond mootness, the only issue appealed. The Court of Appeals incorrectly decided two issues not before it and without the benefit of briefing: 1) *sua sponte* denying Mumford due process by summarily deciding that his position was not entitled to First Amendment protection, ignoring the record and the 1992 District Court Opinion based on the record; and 2) the Court reversing its own 1993 decision that the case should go to trial by reversing specific findings from the 1995 district court decision by incorrectly finding that Lorain "county" referees are state employees, working for a state judge, without even distinguishing the roles of judge as judicial officer and administrative department head for Lorain County.

Defendants never assert anywhere in the record that the position was one for which political or party affiliation was an appropriate requirement. In fact, they deny this is the case. See answer at Apdx. M, p. 4, par. 14: "the political affiliation of Attorney Balunek and Attorney Musson was not relevant to and/or a prerequisite for their respective employment with the Lorain County, Ohio Court of Common Pleas, Domestic Relations Division." These two referees replaced Mumford.

Zieba testified that he knew of no political duties his referees had; that they were free to follow their own conscience as to politics, adding that politics was absolutely not a consideration for the efficient smooth running of the referee position, whether it be Republican, Democrat, Socialist or anything else. Apdx. Y-6.

The other administrative judge, David Basinski, a Democrat, also confirmed in testimony that party affiliation was not a necessary requirement for the effective performance of a Domestic Relations Court Referee. Apdx. S-3. This job entailed

recommending proposed findings of fact and conclusions of law to the judges of both parties. Apdx. J, pp. 1-17. No political duties or party affiliation requirements are described in the Ohio rules of procedure.

The court in the instant case decided that a public positions' general or specific duties are to be determined as a matter of law. The district court at 788 F. Supp. 987, 991 (N.D., Ohio, 1992) had earlier determined that is a question of fact, not of law, relying on *Soderbeck v. Burnett County, Wisconsin*, 752 F.2d 285, 288-289 (7th Cir., 1985). The Sixth Circuit's 1993 decision had agreed with the district court's 1992 decision by finding that the analysis of the merits of Petitioner's claims was to be one based on the "inherent duties of the position and the duties of the new incumbent to determine whether political affiliation is an appropriate consideration for appointment to a particular vacancy." Apdx. F, pp. 8-9. The 1993 and 1997 6th Circuit decisions themselves conflict, revealing the level of confusion extant due to a lack of clarification as to which test is to be applied, factual or legal.

Mumford should prevail under either analysis.

Under a purely factual analysis, defendants' answer and defendants' testimony that the position is not political lead to one conclusion, Mumford prevails. The 1992 district court opinion comes to this conclusion as well.

Under a purely legal analysis, the position of domestic relations court referee is not a political position. Ohio Rules of Civil Procedure 53 and 75 and Ohio Rule of Juvenile Procedure 40 limit the duties of a referee to hearing evidence and making recommendations--duties that under the law or based on a factual analysis come to the same conclusion--Mumford's position before

and after his termination was, under *Branti*, one which did not require party affiliation for its effective performance.

Without any record-based findings, the instant court found that the Lorain County judge was a state judge, and the "county" court was a "state" court at 105 F.3d 264 (6th Cir. 1997), failing to look at the administrative function at work here: a county office holder firing a county employee.

State law does not indicate that the Administrative Judge, acting as employer over County employees, is a state official.

The instant court denied a rehearing *en banc*, though the 11th Amendment issue and the question of law versus question of fact issue as to the non-political nature of Petitioner's position had not been argued or briefed on the record.

The instant decision appealed here conflicts with the decision of this Court in *McMillian v. Monroe County, Alabama*, 65 LW 4403 (1997) [Apdx. BB 1-35], insofar as it fails to analyze who an official represents in a particular area or on a particular issue. Had the Sixth Circuit performed this analysis, the judges' roles as administrators over employment matters would have been scrutinized, and their role as employers over local county employees would have caused the Sixth Circuit to come to the conclusion that Judges Zieba and/or Basinski are, in their capacities as administrators over county employees, representatives of the county, not the state.

REASONS FOR GRANTING THE WRIT

This case presents for review a question of paramount importance to all government employers, and employees who are entitled to exercise their precious First Amendment freedoms of uncoerced political belief and association and, most importantly,

the general public which relies on both the continued vibrancy of the First Amendment freedom which undergirds our democratic form of government and the efficient provision of government services.

In *Elrod v. Burns*, 427 U.S. 347, 359, 96 S.Ct. 2673, 2683 (1976), this Court held that conditioning government employment on the employee's support for the favored political party "unquestionably inhibits protected belief and association" in violation of the First Amendment to the United States Constitution. In *Branti v. Finkel*, 455 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574, this Court clarified the existence of a narrow exception to this general principle whereby political patronage remains constitutionally permissible only if "party affiliation is an appropriate requirement" for the employment position.

It is beyond dispute that this standard has resulted in conflicting tests applied by the different Courts of Appeal, "inconsistent and unpredictable results" in litigation, and general confusion for government employers and employees alike. *See, e.g., Rutan v. Republican Party*, 110 S.Ct. 2729, 2756-57 (1990) (Scalia, J., dissenting).

The instant case, in which the issue is whether political party affiliation is an appropriate employment requirement for a hearing officer or referee, is an excellent vehicle for this Court to provide much needed clarity. The instant case directly conflicts with *Roldan-Plumey v. Cerezo-Suarez*, 115 F.3d 58 (1st Cir. 1997), and *Meeks v. Grimes*, 779 F.2d 417 (7th Cir. 1985). This conflict between the Circuits goes beyond a mere conflict as to result and embodies a deeper and pervasive conflict as to

the proper method of analysis: i.e., whether the "appropriate requirement" criteria is an issue of fact or an issue of law.

This case also presents a second important issue for review by this Court. In this case the court below failed to perform the factual analysis required by this Court in *McMillian v. Monroe County, Alabama*, 65 L.W. 4403 (1997) in order to determine whether the administrative judge who terminated Petitioner's employment was acting as the final policymaking decision maker for Lorain County or the State of Ohio. The court below, by basing its decision on the status of Respondent as a judge rather than his status as a County Administrator with supervisory authority over county employees, such as petitioner, thereby created a conflict with numerous decisions of other United States Courts of Appeals which have addressed this issue and, as a result, inappropriately expanded the scope of Eleventh Amendment immunity.

For the reasons set forth more fully below, David Mumford respectfully requests that this Honorable Court issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit in this case in order to provide much needed stability and clarity on these two issues of paramount public importance which have engendered irreconcilable conflicts between all federal courts of appeal.

#1 Whether, consistent with this Court's holdings in *Branti v. Finkel*, 455 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574, *Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729 (1990) and *O'Hare Truck Service, Inc. v. City of Northlake*, 116 S.Ct. 2353 (1996), and in direct conflict with decisions from this Court and from other Circuits, the Sixth Circuit

erred in holding that a government position was inherently political as a matter of law, when the Defendants admit and all the facts demonstrate that political affiliation was not an appropriate requirement for the position?

This Court decided *Elrod v. Burns*, 427 U.S. 347 (1976) as a benchmark case twenty one years ago. Then, seventeen years ago, this Court decided *Branti v. Finkel*, 455 U.S. 507, 519-520 (1980) holding that the "First Amendment forbids government officials to discharge...public employees solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement." *Rutan v. Republican Party*, 110 S.Ct. 2729, 2732 (1990), *citing Branti v. Finkel, supra.*

In *Branti v. Finkel*, 455 U.S. at 524, 100 S.Ct. at 1297-98, Justice Powell predicted that problems in application of this Court's holding would result because: "The standard articulated by the court [in *Branti*] is framed in vague and sweeping language. Elected and appointed officials at all levels...no longer will know when political affiliation is an appropriate consideration in filling a position." 445 U.S. at 524, 100 S.Ct. at 1297-98.

Eleven years later Justice Scalia pointed out that Justice Powell's prediction was prophetic, that "[t]he Courts of Appeal have devised various tests for determining when 'affiliation is an appropriate requirement' and that '[t]hese interpretations are...significantly at variance with each other.'" *Rutan v. Republican Party*, 110 S.Ct. at 2756. (dissenting opinion)

Of course, not only judges and elected and appointed officials are confused, but also thousands of public employees are unsure of whether they have protection under the Constitution of the United States. Parties on both sides of the issues of who is

protected and who is not [and when], and what clearly established law exists [and when], need clarification after almost two decades after *Branti*.

With so many conflicts in so many areas, it is apparent that both defendant public officials and plaintiff public employees are entitled to have the method of applying the *Branti* test clarified.

The test initially was created by this Court in *Elrod* in 1976 and changed in *Branti in 1980*. For the last seventeen years, there has been no benchmark case clarifying the problems that have developed as a result of the circuit courts' interpretations of both *Elrod* and *Branti*. The conflicts in application of the *Branti* test that exist between the circuits makes this case a perfect vehicle for this Court to give much needed instruction and clarification needed by public office holders and employees.

Circuits conflict as to whether the analysis should be based on law, based on fact, based on job description, based on job responsibilities, based on job category, based on inherent duties, based on statutory duties, based on relative pay, technical competence, power to control others, authority to speak in the name of policy makers, public perception, influence on programs, contact with elected officials, responsiveness to partisan politics and political leaders and whether the responsibilities of the position are not well defined or are of broad scope. [See "A Decade of *Branti* decisions: A Government Official's Guide to Patronage Dismissals", The American University Law Review, Vol. 39:11, Susan Lorde Martin, p. 26] The waste of resources, the expansion of litigation and the burdens to the judicial system at every level beg for guidance and clarification of the *Branti* test from this Court.

There is a significant, longstanding split between the Circuit Courts of Appeals as to whether the analysis of a public employee's position as falling under the protections of *Branti* is to be viewed as a question of law or a question of fact.

Circuit courts finding that this is a question of law are as follows: *Ness v. Marshall*, 660 F.2d 517, 522 (3rd Cir., 1981) [where, as a matter of law, a person is determined to have occupied a policymaking position, that person's claims to protection under *Elrod* and *Branti* are disposable on summary judgment]; *Mumford v. Basinski*, 105 F.3d 264, 271 (6th Cir. 1997) [although unique duties are typically fact driven, characterization of general *or* specific duties are a question of law]; and *Bauer v. Bosley*, 802 F.2d 1058, 1062 (8th Cir., 1986) [on the facts before us the SLA II position is excepted from the rule of *Elrod-Branti* as a matter of law.] The *Bauer* Court's next comment, at 1062, is indicative of the need for an *Elrod-Branti-Mumford* trilogy from this Court, that "courts themselves have disagreed whether the determination is one of law or fact. *See Horton v. Taylor*, 767 F.2d 471, 478 (8th Cir. 1985) and cases cited therein."

Circuit courts, and the apparent majority of the circuits, finding that this is a question of fact are as follows: *Mendez-Palou v. Rohena-Betancourt*, 813 F.2d 1255, 1258 (1st Cir. 1987) [fact-specific nature of the analyses performed by these other courts makes it difficult in any given case to decide the merits solely on the basis of precedent]; *Rodriguez-Burgos v. Electric Energy Authority*, 853 F.2d 31, 37 (1st Cir., 1988) [there remains, in our view an important factual dispute about whether or not the job requires PDP affiliation for effective performance]; *Zold v. Township of Mantua*, 935 F.2d 633, 635 (3rd. Cir., 1991)

[each decision is, of course, fact specific for that case]; *Stott v. Haworth*, 916 F.2d 134, 145 (4th Cir., 1990) [case by case, position by position, activity by activity analysis required for just adjudication]; *Nekolny v. Painter*, 653 F.2d 1164, 1169 (7th Cir., 1981) [the determination of status as a policymaker in many cases presents a difficult factual question]; *Soderbeck v. Burnett County, Wis.*, 752 F.2d 285, 288-289 [rejecting defendants argument that whether loyalty is essential is always a question of law] (7th Cir., 1985)]; *Meeks v. Grimes*, 779 F.2d 417, 420 [noting that it was not possible to state categorically that bailiffs are confidential employees as a matter of law] (7th Cir., 1985); *Lohorn v. Michal*, 913 F.2d 327, 335 (7th Cir., 1990) [district court erred in concluding that, *as a matter of law*, the statutory label alone rendered Mr. Lohorn a "policymaker" within the meaning of the *Elrod-Branti* exception to politically motivated dismissals]; *Matlock v. Barnes*, 932 F.2d 658, 663 (7th Cir., 1991) [by its nature, the question of whether a job is policymaking or confidential is often factual]; *Zorzi v. County of Putnam*, 30 F.3d 885, 893 (7th Cir., 1994) [whether *Meeks* exempts Hansen from the requirements of *Elrod-Branti* therefore requires a factual inquiry into whether Hansen and Zorzi's working relationship was intimate and involved direct and constant contact]; *Horton v. Taylor*, 767 F.2d 471, 479 (8th Cir. 1985) [the legal standards to be applied by the district court depend on these preliminary factual findings] and *Terry v. Cook*, 866 F.2d 373, 377-378 (11th Cir., 1989) [loyalty to an individual sheriff as an appropriate requirement for effective job performance has not been established [and] is a determination [that] depends on the actual responsibilities of each position and the relationship of each to the sheriff].

The Court in *Horton v. Taylor*, 767 F.2d 471, 478 (8th Cir. 1985) saw five years after *Branti* the confusion Justice Powell predicted that "...courts [would] disagree whether such determinations are matters of fact or of law--and are also aware of the implications of this issue for the degree of deference we must pay the district court's determinations. *See* Fed.R.Civ.P. 52(a)."

The positions afforded protection and those denied protection create the same deepening rift between the circuits as to the types of positions protected. A sheriff in one circuit may be protected, and not in another. A referee/hearing examiner is protected in one circuit, and not in another.

Examples of this disparity in job title/job function as to who is protected and who is not, between the circuits, follows:

Job Title	**Protected**	**Not Protected**
Attorney	2nd Cir.[2]	3rd Cir.[3]

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[2] *Tavano v. County of Niagra*, 800 F.2d 1128 (2nd Cir., 1986) affirming district court at 621 F. Supp. 345 (W.D.N.Y., 1985).

[3] *Ness v. Marshall*, 660 F.2d 517, 522 (3rd Cir., 1981).

Job Title	Protected	Not Protected
Deputy Sheriffs	4th Cir.[4]	7th Cir.[5]
	3rd Cir.[6]	5th Cir.[7]
	10th Cir.[8]	11th Cir.[9]
	5th Cir.[10]	7th Cir.[11]
Bailiffs	7th Cir.[12]	6th Cir.[13]
Referee/Hearing Examiner	1st Cir.[14]	6th Cir.[15]

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[4] *Jones v. Dodson*, 727 F.2d 1329 (4th Cir., 1984)

[5] *Upton v. Thompson*, 930 F.2d 1209 (7th Cir., 1991)

[6] *Burns v. County of Cambria, Pa.*, 971 F.2d 1015 (3rd Cir. 1992)

[7] *McBee v. Jim Hogg County, Texas*, 730 F.2d 1009 (5th Cir., 1984)

[8] *Dickeson v. Quarberg*, 844 F.2d 1435 (10th Cir., 1988), involving deputy head jailer to sheriff.

[9] *Terry v. Cook*, 866 F.2d 373 (11th Cir., 1989)

[10] *Barrett v. Thomas*, 649 F.2d 1193 (5th Cir., 1981)

[11] *Dimming v. Wahl*, 983 F.2d 86 (7th Cir., 1993)

[12] *Meeks v. Grimes*, 779 F.2d 417 (7th Cir., 1985)

[13] *Balogh v. Charron*, 855 F.2d 356 (6th Cir., 1988)

[14] *Roldan-Plumey v. Cerezo-Suarez*, 1997 U.S. Lexis 13050.

[15] *Mumford v. Basinski*, 105 F.3d 264 (6th Cir., 1997)

Petitioner submits that proper application of the *Branti* analysis should produce such inconsistent results because the analysis must be based on facts, not mere job titles. The consistency that is needed is that all circuits should scrutinize cases based on a factual analysis of the inherent duties of the position, not based on a mere legal and superficial analysis of job titles.

Instead, the determination as to the propriety of a political affiliation requirement for a particular position should be based on what the persons in the actual job does for the particular employer. Since not every government office operates in the same way, it is only to be expected that persons with the same job titles in different communities have different responsibilities. Therefore, a person occupying a position of court referee in one jurisdiction may have duties that would lead to legitimate considerations of political affiliation, while a person with that title in another jurisdiction may have duties of a purely non-political nature so that political affiliation should, pursuant to the First Amendment, play no part in the decisions made regarding his employment. The Court in *Meeks v. Grimes*, 779 F.2d 417, 420-21, n.2 (7th Cir. 1985), accordingly, found that "job responsibilities and duties can vary greatly between different governmental units and or even within a governmental unit...[therefore]...the test under *Branti* must be applied to each individual office, and status under that formulation is left to the trier of fact to be determined."[16]

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[16] Another conflict exists between the instant case and *Meeks*. *Meeks* involved referees reporting to one judge. The Court found the referees were protected because they did not have everyday contact with judges in their chambers. *Meeks*, at 417, 423. In the instant case,

The instant case could be viewed, ironically, as lending some predictability to the process, since it is based on a hypotethical job description of how a referee operates. Under its analysis, any person with that job title would not be protected, regardless of what their job duties are.

This analysis runs counter to the manner in which most circuits follow this Court's teachings in *Elrod*, *Branti*, and *Rutan*. The Sixth Circuit's analysis leads to inconsistency and unpredictability among the Circuits.

Moreover, the Sixth Circuit decision allows a government employer too much leeway determining which employees are protected by the First Amendment. Simply by labelling the employees' job titles, the employer can take away constitutionally protected rights. The mode of analysis utilized by the Sixth Circuit should not be utilized.

Instead, the principles pronounced in this Court's prior decisions should be reaffirmed and further clarified so that government employees will be able to predict whether their careers are subject to political patronage by reference to what they know to be their legitimate job duties, and so government employers will know the boundaries of their employment powers.

Justice Scalia observed in *Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729, 2756-2757 (1990) after citing a number of job categories, like the above, where protection is inconsistently applied and withheld by the different circuits, that "this summary should make it obvious that the 'tests' devised

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the referees reported to two judges, of different parties, Apdx. D, p. 11., and, in spite of this fact, were viewed as not protected by the instant 6th Circuit decision.

to implement *Branti* have produced inconsistent and unpredictable results." Petitioner is in agreement with what Justice Scalia points out next, at 2757, that

> "...the current doctrine leaves many employees utterly in the dark about whether their jobs are protected, they are likely to play it safe. On the other side, the exception was designed to permit the government to implement its electoral mandate...unless the government is fairly sure that dismissal is permitted, it will leave the politically uncongenial official in place, since an incorrect decision will expose it to lengthy litigation and a large damage award, perhaps even against the responsible officials personally.

When looking at the referee position in question, which involves simultaneously recommending findings of fact and conclusions of law to two judges of different parties sitting in the most "impartial" of government positions, the observation Justice Scalia's made in *Rutan* is central: "if there is any category of jobs for whose performance party affiliation is not an appropriate requirement, it is the job of being a judge, where partisanship is not only unneeded but positively undesirable." *Id.* at 2746. If this is true for judges, it is true for their impartial referees.

This Court in *O'Hare Truck Service, Inc. v. City of Northlake*, 116 S.Ct. 2353, 2358 (1996) found that the *Branti* standard required a case-by-case fact based application. A fact-driven analysis is the only fair analysis when applying *Branti* because whether party affiliation is an appropriate requirement for the position necessarily must turn on the facts of each situation. Again, as in this case, the position involved reporting

simultaneously to two judges of different parties. How can this undisputed fact be ignored in favor of non-record based assumptions inferred by the Circuit Court in this case reading between the lines of various civil rules? At Apdx. A, p. 22, the 6th Circuit, based on a review of Ohio Civil Rule 53, infers, with no reference to any evidence in the record, that "unquestionably, the inherent duties of an Ohio domestic relations court referee entail a relationship of confidence between the referee and the judge(s) he serves. The referee is privy to confidential litigation materials and internal court communica-tions in the discharge of his duties, and further maintains a confidential relationship with the judge(s) which he serves." This "unquestionable" conclusion, however, flies in the face of the undisputed facts and testimony in this case, and is wholly drawn from inference not based on evidence in the record. No evidence exists in the record that Petitioner was privy to "confidential litigation materials" or "internal court communications." None are identified. None exist. Further, no "confidential" relationship exists--no one in this case disputes that the referee position in question reports simultaneously to two judges of different parties. No confidential relationships exist. None have been identified.

The instant case employed an analysis that took the issue that Mumford's referee position was not a political position from the trier of fact, the district court, that had already decided the issue in 1992, and made a sweeping, non-record-based decision that did not utilize the application of *Branti* to the individual office, but rather, as indicated above, made the assumption that "friction and animosity" were probable expectations that would creep into the situation. Apdx. A, p. 19. This was not in the record. There were two judges to report to from different political

parties: Administrative Judge Zieba, a Republican; and alternating Administrative Judge Basinski, a Democrat. See Apdx. V, p.1, testimony of referee Frank Giamboi.

The instant case conflicts with *Meeks v. Grimes*, 779 F.2d 417, 420-421, n.2 (7th Cir., 1985), in that the *Meeks* court ruled that "...it is impossible to generalize about the nature of an individual type of position, such as bailiff or secretary; job responsibilities and duties can vary greatly between different governmental units or even within a governmental unit...For this reason the test under *Branti* must be applied to each individual office, and status under that formulation is left to the trier of fact to be determined." The instant case makes no such application to the referee position in question.

Meeks, at 420-421, and n.2 also rules that it cannot conclude that "bailiffs" are confidential employees as a matter of law because bailiffs are duty-bound to protect the sanctity of the court, and, "...while political affiliation may be an acceptable proxy for loyalty, trust, and maybe even efficiency, it would cast the net of the *Elrod* exception too wide to allow political support to be used to extrapolate a tendency to breach a sworn duty, behave unprofessionally, or commit criminal acts."

In addition, in *Meeks* at 423, n.7, the 7th Circuit wrote that "[w]hat may distinguish judges for patronage purposes is the unique relationship they have with the people who work with them in their chambers. However, differing structures of judicial systems and governments mean that each case is unique and an intimate working environment may or may not exist surrounding any political hiring authority."

The problem with a purely legal analysis is that it ignores the realities of the position in question, and allows for inferences

based on "law" that arrive at "fact" that is not in evidence in the record.

The instant case also is in direct irreconcilable conflict with *Roldan-Plumey v. Cerezo-Suarez*, 115 F.3d 58 (1st Cir. 1997). In *Roldan-Plumey v. Cerezo-Suarez* a hearing examiner's position was found by the First Circuit to involve inherent duties of holding hearings, evaluating evidence, carrying out legal studies and issuing recommendations to a commissioner. This is absolutely no different than what David Mumford did for the Lorain County Court--he conducted hearings, evaluated evidence and made recommendations to the judges of the court. Yet the 6th Circuit found Mumford's position taking and analyzing evidence and making recommendations of findings of fact and conclusions of law to county judges to be a political position. As Justice Scalia has observed, how can party affiliation enter into such decisions, decisions that require impartiality?

The First Circuit's decision in *Roldan-Plumey v. Cerezo-Suarez* appropriately made a factual inquiry and looked only to the inherent duties of the position and found that they involved discrete technical and professional duties, and that the position was not a political position. The *Roldan-Plumey* court made specific findings that the "Examining Officer" held hearings, took oaths and declarations, evaluated evidence regarding conclusions of fact and law, carried out legal studies and issued recommendations to the Commissioner. These are the very duties performed by Mumford.

The instant case clearly made no such detailed, factual inquiry. Instead, it arrives at conclusions not supported by record evidence. For instance, it found that Mumford had access to confidential court documents and was in a personal confidential

relationship. Apdx. A, p. 22. There is absolutely nothing in the record to support this conclusion. In fact, all the evidence is to the contrary.[17]

Thus, the *Roldan-Plumey* decision of the 1st Circuit is in direct conflict with the instant case and with *Meeks*.

The *Branti v. Finkel* plurality held that "conditioning public employment on the provision of support for the favored political party 'unquestionably inhibits protected belief and association.'" *Rutan*, 110 S.Ct. at 2734, quoting *Branti* at U.S. 259, S.Ct. 2683.

This Court also has recognized that "a government has a significant interest in ensuring that it has effective and efficient employees." *Rutan* at 110 S.Ct. 2734, citing *Branti* at U.S. 259, S.Ct. 2683.

Petitioner respectfully submits that it is imperative that the *Branti* exception, whereby political affiliation may be used as an employment criteria only if it is an "appropriate requirement for the position involved," be clarified by this Court in order that the interests of the general public, government employers and government employees are no longer frustrated.

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[17] This type of analysis was specifically rejected by the Circuit Court in *Meeks v. Grimes*, 779 F.2d 417, 423 (7th Cir. 1985): "[w]e will not engage in the process of inferring a breach of duty from political opposition where the record does not even clearly support a finding that these bailiffs had routine access to sensitive documents."

#2 **Whether, under *McMillian v. Monroe County, Alabama*, 65 L.W. 4403 (1997), a county is liable for the administrative acts of an administrative judge for a county common pleas court acting in the particular area or issue regarding employment decisions for a local government?**

The decision in the instant case was rendered prior to this Court's recent decision involving a government official and the 11th Amendment. *McMillian v. Monroe County, Alabama*, 65 L.W. 4403 (June 2, 1997). In *McMillian* this Court held that the sheriff of an Alabama county, when acting in his law enforcement capacity, was a state official immune to suit for actions taken in that capacity pursuant to the Eleventh Amendment. What is instructional is not the result in *McMillian*, but, rather, the analysis. *McMillian* held that "[o]ur cases on liability of local governments under Section 1983 instruct us to ask whether governmental officials are final policymakers for the local government in a particular area, or on a particular issue." *Id.* at 4405, quoting *Jett v. Dallas Independent School District*, 491 U.S. at 738, 109 S.Ct. 2702 (1989) (court must identify 'those officials who have the power to make official policy *on a particular issue*.(emphasis added)."

Zeiba, as administrative judge, was a final policymaker when making personnel decisions for the entity, Lorain County. Zieba ran the domestic relations court. Lorain County Commissioner Jacoby testified that "all the elected officials in Lorain County, do their own hiring, set their own policies, make all their own decisions, with the exception of their budget. That's the only area of control we have over the departments."

Apdx. W, p.1. Commissioner Jacoby also testified that all the employees who work at the Domestic Relations Court are employees of Lorain County, including the judges and that Judges Basinski and Zieba and the court referees receive their paychecks from the Lorain County Auditor. Apdx. W., p.2. Therefore Judge Zieba was the administrator and final policy-maker for the County of Lorain when making employment decisions.[18]

The instant 6th Circuit decision never addresses or makes findings as to whether, in the performance of his duties as an administrator over Lorain County employees, Judge Zieba was a final policymaker for the county or state as to his administrative duties regarding Lorain County employees working for the court. This Court in *McMillian v. Monroe County, Alabama*, 65 LW 4403 (June 2, 1997) spells out that "...the question is not whether Alabama sheriffs act as county or state officials in all of their official actions, but whom they represent in a particular area or on a particular issue."

Rather than performing this analysis which is focussed on the nature of the particular actions in question, the Sixth Circuit's analysis is the sort of "...all or nothing..." analysis rejected by this Court in *McMillian*, 65 L.W. at 4404.

Instead, at Apdx. A, p.7, the court believed that "[t]he central inquiry confronting this appellate review is whether the

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[18] The instant case, at Apdx. A-12 attempts to imply that "state" money from some "special court fund" pays these county referees. This is not true, and Ohio Revised Code Section 2151.13 (Apdx. J-18) merely indicates that judges and employees of this court will be paid by the county treasurer. Nowhere in the record is there evidence that state money pays county referees.

Domestic Relations Court is a state of Ohio entity, or instead is an appendage of the Lorain County government, for section 1983 purposes." The court in the instant case concluded that because local courts are created by state law, because the State Supreme Court has supervisory authority over local courts, because state statutes outline the jurisdiction of local courts and because counties are required to provide funds for local courts, therefore they are components of state government. [Apdx. A, pp. 7-16] The Sixth Circuit implies, without stating, that these factors make the administrative judge a state official for all purposes and in all areas in which he makes any type of decision, even non-judicial administrative employment decisions. This analysis totally ignores the *McMillian* question to be asked: which governmental body did Judge Zieba represent on a particular issue or in a particular area? While acting in a judicial capacity, the judge may be representing the state, but the issue here is who he represents when making employment decisions regarding Lorain County employees. In this area, Zieba represented the County. This issue was ignored in the instant case.

Other circuits have anticipated *McMillian*, and thus are in conflict with the Sixth Circuit. The Fifth Circuit Court of Appeals in *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir., 1980) ruled that there were many actions of a county judge that justifiably could be considered to constitute or represent county "policy" and that in addition to judicial duties, a Texas county judge was charged with the performance of numerous executive, legislative and administrative chores in the day-to-day governance of the county and concluded that "...at least in those areas in which he, alone, is the final authority or ultimate repository of county power, his official conduct and decisions

must necessarily be considered those of one 'whose edicts or acts may fairly be said to represent official policy' for which the county may be held responsible under section 1983." This analysis conflicts with the instant case.

Decisions from other circuits also conflict with the 6th Circuits approach: *Parker v. Williams*, 862 F.2d 1471, 1479 (11th Cir., 1989) [one official may exercise county authority over some matters and state authority over other matters]; *Davis v. Ector County, Tex.*, 40 F.3d 777, 784 (5th Cir., 1994) [although the district attorney's office (like Ector County itself) is a creation of the state, all of its functioning is county based]; *Harter v. Vernon*, 101 F. 3d 334, 342 (4th Cir., 1996), [Rockingham County Sheriff not a state official because the state treasury would not pay any judgement]; and *Lucas v. O'Loughlin*, 831 F.2d 232, 234-235 (11th Cir., 1987) [where sheriff's salary and deputies are paid out of county funds, where county commissioners budgeted the money for the sheriff's department, where the sheriff was elected under state law to serve the county as sheriff in the capacity of employer over his deputies, sheriff's actions were actions of the county[19]].

Though the judges of Lorain County Common Pleas Court can travel to other counties to hear cases, they cannot travel to other counties to fire county employees in other counties. Under the *McMillian* analysis, the Lorain County judges

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[19] The court in the instant case found that domestic relations judges are elected by county voters and that the county must fund the court with Lorain County funds. Apdx. A, pp. 12-13 and Apx. D, p. 3. No record based finding was reached in the instant case that a judgment in this case would be paid out of the state treasury.

cannot represent the state as to the particular area or issue regarding employment decisions for a Lorain County local government, since their power to hire and fire stops at the county line.

As the Court in *Eggar v. City of Livingston*, 40 F.3d 312, 315 (9th Cir., 1994) pointed out, "...officials can act on behalf of more than one government entity. *Owens v. Fulton County*, 877 F.2d 947, 952 (11th Cir., 1989)." Judge Zieba, in his administrative capacity in hiring and firing court employees, acted on behalf of the local political subdivision, Lorain County. In *Van Ooteghem v. Gray*, 774 F.2d 1332, 1337 (5th Cir., 1985) the Fifth Circuit appropriately pointed out that "[w]hatever state duties a County Treasurer may have, we are persuaded that in the personnel matters at issue here, Gray was wearing his county hat." Could Judge Zieba by assignment hear a case in Cuyahoga County rather than Lorain County? Of course. Could Lorain County Domestic Relations Court Judge Zieba fire Cuyahoga County Domestic Relations Court employees? Of course not. In fact, it is demonstrative that the Lorain County Prosecutor, rather than the Ohio Attorney General, represented this "county" defendant throughout the proceedings. The reverse would have been the case if defendant was clearly a "state" entity. It is logical, therefore, to assume that it would be the county that would be paying any damages should Mr. Mumford prevail.

Therefore, Judge Zieba was not acting in a state capacity, but rather, when wearing his administrative hat, was acting as a local County official, and therefore suable in his official capacity under 42 U.S.C. Section 1983, creating liability for Lorain County.

In light of this conflict between the analysis of the Sixth Circuit and that of other circuits, and in light of the fact that the Sixth Circuit did not have the benefit of this Court's *McMillian* decision, at the very least, this case should be remanded to the lower courts for reconsideration of this issue.

In addition, even if the administrative judge of the court was acting as a state official when making personnel decisions, the Eleventh Amendment would not mandate dismissal of the complaint since that Amendment does not prevent the injunctive prospective relief of reinstatement[20]. Petitioner Mumford still seeks reinstatement and backpay.

The instant case also misinterprets two of this Court's opinions, *Ex Parte Young*, 209 U.S. 123 (1908) and *Green v. Mansour*, 474 U.S. 64, 68, 88 L.Ed.2d 371, 106 S.Ct. 423, 426 (1985). Footnote 8 of the instant case (Apdx. A, pp. 15-16) theorizes that the invocation of *Young* for prospective relief only cannot be salvaged because Mr. Mumford has joined with this request a prayer for retrospective relief, obviously backpay. The instant opinion, in this regard, relies on *Green v. Mansour*, 474 U.S. 64, 68, 88 L.Ed.2d 371, 106 S.Ct. 423 (1985). Yet nowhere in *Green v. Mansour* did this Court make such a ruling. What this Court did was to state that "the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law...(and that)...[r]emedies designed to end a continuing violation of

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[20] Once the record has been developed to show that no judgement in this case would come from state funds, backpay would also be available. This issue is not part of the record and should be developed below.

federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Id.*, at 68. There is no language in *Green v. Mansour* that could lead to a conclusion that "joining" a request for prospective and retroactive relief defeats a valid claim for prospective relief. Therefore, the court in the instant case clearly erred in failing to remand this case for trial on the issue of reinstatement. As long as Mumford is not reinstated, the unconstitutional violation continues. Rein-statement is the only prospective remedy to cure that violation.

The instant decision must be remanded with instructions to follow this Court's analysis in *McMillian*, or reversed, in order to limit the application of the 11th Amendment to true actions of the state as to the particular issue or area involved. Anything less will allow local entities to escape their constitutional responsibilities by labelling officials who truly are acting on behalf of the local entity as state officials.

CONCLUSION

For the reasons set forth above, this Court's standards for granting certiorari, as set out in Sup. Ct. Rule 10.1 are well met in this case. The petition should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The
Supreme Court of The United States
October Term 1996

DAVID M. MUMFORD,
Petitioner,

v.

DAVID A. BASINSKI,
Respondent.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Sixth Circuit

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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336 pp

APPENDIX CONTENTS

		Page
A.	OPINION FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, CASE NO. 95-4127, filed 1/23/97	A 1-26
B.	PETITION AND SUGGESTION FOR REHEARING *EN BANC* TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, CASE NO. 95-4127, filed 2/6/97	B 1-22
C.	ORDER DENYING PETITION FOR REHEARING *EN BANC* TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, CASE NO. 95-4127, filed 3/7/97	C 1-2
D.	MEMORANDUM OF OPINION OF DISTRICT COURT, filed 3/31/92	D 1-14
E.	OPINION, ORDER, AND JUDGMENT FROM DISTRICT COURT, filed 9/28/95	E 1-7
F.	OPINION FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, CASE NO. 92-3430, filed 9/1/93	F 1-18

PAGE

G. JUDGMENT FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, CASE NO. 92-3430, filed 10/8/93 . . . . . G 1-2

H. MOTION TO STRIKE APPELLANTS' ARGUMENT AND RECORD DESIGNATIONS THAT FALL BEYOND THE SCOPE OF THE INSTANT APPEAL, filed 2/14/96 . . . . . H 1-5

I. OHIO ATTORNEY GENERAL OPINIONS
NO. 85-055, filed 8/25/88 . . . . . I 1-17
NO. 85-014, filed 4/9/85 . . . . . I 18-33

J. RULES AND STATUTE:
JUVENILE PROCEDURE RULE 40 . . . . . J 1-5
OHIO RULES OF CIVIL PROCEDURE 53 . . . . . J 6-11
OHIO RULES OF CIVIL PROCEDURE 75 . . . . . J 12-17
U.S.C.A. § 2151.13 . . . . . J 18-23

K. COMPLAINT, FILED IN DISTRICT COURT, filed 12/17/90. . . . . K 1-7

L. SEPARATE ANSWER OF DEFENDANT JUDGE JOSEPH C. ZIEBA, filed 1/28/91 . . . . . L 1-10

M. AFFIDAVIT OF CATHERINE CATANZERITE, taken 11/12/90 . . . . . M 1-3

N. AFFIDAVIT OF DAVID MUMFORD, taken 8/29/91 . . . . . N 1-5

PAGE

O. AFFIDAVIT OF JOSEPH C. ZIEBA, taken 8/30/91. . . . . O 1-1

P. LETTER FROM JOSEPH ZIEBA TO DAVID MUMFORD, dated 12/22/88 . . . . . P 1-1

Q. LETTER FROM FRANK C. GIAMBOI TO DAVID A. BASINSKI, dated 12/7/90 . . . . . Q 1-7

R. DEPOSITION EXCERPT OF JUDGE DAVID A. BASINSKI, taken 12/16/94 . . . . . R 1-5

S. DEPOSITION EXCERPT OF JUDGE DAVID A. BASINSKI, taken 4/27/91 . . . . . S 1-19

T. DEPOSITION EXCERPT OF ADELBERT BALUNEK, taken 3/22/91 . . . . . T 1-9

U. DEPOSITION EXCERPT OF FRANK GIAMBOI, taken 3/22/91 . . . . . U 1-5

V. DEPOSITION EXCERPT OF HERBERT JACOBY, taken 11/21/94 . . . . . V 1-7

PAGE

W. DEPOSITION EXCERPT OF HENRY T. WEBBER, FORMER JUDGE, taken 4/25/91 . . . . . W 1-19

X. DEPOSITION EXCERPT OF JUDGE JOSEPH ZIEBA, taken 3/23/91 . . . . . X 1-16

Y. DEPOSITION EXCERPT OF JUDGE JOSEPH ZIEBA, taken 6/15/91 . . . . . Y 1-6

Z. FACE SHEET TO 1989 ANNUAL REPORT OF LORAIN COUNTY COURT OF COMMON PLEAS . . . . . Z 1-1

AA. OPINION FROM THE UNITED STATES SUPREME COURT, NO. 96-542 decided 6/2/97 . . . . . AA 1-35

BB. NOTICE OF APPEAL TO DISTRICT COURT, filed 9/28/95 . . . . . BB 1-2

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OPINION

Sixth Circuit Case Nº. 95-4127
Filed January 23, 1997

Pages A-1 thru A-26

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1997 FED App. 0028P (6th Cir.)
File Name: 97a0028p.06

No. 95-4127

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID M. MUMFORD,
Plaintiff-Appellant,

v.

DAVID A. BASINSKI,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Northern District of Ohio

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Decided and Filed January 23, 1997

Before: **KRUPANSKY, BOGGS,** and **SILER,** Circuit Judges.

KRUPANSKY, Circuit Judge. The plaintiff-appellant, David M. Mumford ("Mumford"), has contested the district court's dismissal, as moot, of his 42

U.S.C. § 1983 claim against Judge David A. Basinski ("Basinski"), the successor in office of Mumford's former employer, former Judge Joseph C. Zieba ("Zieba"), who during his judicial tenure was the Administrative Judge of the Lorain County Common Pleas Court Domestic Relations Division ("the Domestic Relations Court"). The complaint had sought equitable relief for the political termination by Zieba of Mumford's at-will employment as the chief referee of the Domestic Relations Court in alleged violation of his First Amendment rights. On September 28, 1995, the trial court ruled that Mumford's claims against Basinski, as successor in office to Zieba, became moot upon the expiration of Zieba's term as a judge of the Domestic Relations Court which had resulted in Zieba's dismissal as a party defendant, and that Lorain County, Ohio, the identified interested public entity, had been previously dismissed as a defendant by virtue of the Sixth Circuit's dismissal, in *Mumford v. Zieba*, 4 F.3d 429, 435 (6th Cir. 1993), of the Domestic Relations Court as a party defendant. *Mumford v. Zieba*, 915 F.Supp. 917 (N.D. Ohio 1995).

Mumford, a registered member of the Democratic Party, served as a referee of the Domestic Relations Court from 1984 until January 2, 1989. In 1988, Mumford aided a Democratic incumbent judge of the Domestic Relations Court, Henry T. Webber, in his reelection bid against his Republican challenger, Joseph Zieba. Zieba prevailed in the November 1988 election.

During the campaign, Zieba had expressly advised Mumford, "don't get caught in the cross-fire." On December 22, 1988, Zieba, as judge-elect of the Domestic Relations Court who would serve as the Administrative Judge of that court, informed Mumford by letter that his employment with the Domestic Relations Court would terminate immediately upon Zieba's assuming office on January 3, 1989.[1] *Mumford*, 4 F.3d at 430.

On December 17, 1990, the plaintiff initiated this action against the Domestic Relations Court, and Zieba in both his personal and official capacities, under 42 U.S.C. § 1983, alleging that he had been terminated because of his political affiliation, which purportedly deprived him of his First Amendment rights. The plaintiff sought damages, declaratory relief, and an injunction compelling his reinstatement with back pay and benefits plus interest. On March 31, 1992, the district court, in deciding cross motions for summary judgment, *inter alia* denied Zieba's summary judgment motion anchored in qualified immunity. *Mumford v. Zieba*, 788 F.Supp. 987, 991-92 (N.D. Ohio 1992), *rev'd*, 4 F.3d 429 (6th Cir. 1993). On September 1, 1993, this court reversed the rejection of Zieba's qualified immunity defense, ruling that the law was not clearly established in January 1989 that a

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[1] Ohio court referees serve at the pleasure of the appointing court. *Mumford*, 4 F.3d at 430 n.1.

state court judge could not refuse to retain an at-will court referee for political reasons. *Mumford v. Zieba*, 4 F.3d 429, 433 (6th Cir. 1993). In addition to dismissing Mumford's claims against Zieba in his individual capacity, this reviewing court also dismissed the Domestic Relations Court as a party defendant because a section 1983 claim is not cognizable against a state court. *Id.* at 435 (*citing Foster v. Walsh*, 864 F.2d 416, 418 (6th Cir. 1988) (per curiam)). This court remanded the cause to the trial court for adjudication of the remaining claims, to wit, Mumford's claims for equitable relief asserted against Zieba in his official capacity. *Mumford*, 4 F.3d at 435.

On January 2, 1995, Zieba's six-year term of office on the Domestic Relations Court expired. On February 13, 1995, the district court substituted Basinski, the successor Administrative Judge of the Domestic Relations Court, in his official capacity as the named successor defendant herein. On September 8, 1995, Basinski moved for dismissal of the action as moot, urging that he had no part in Zieba's decision to discharge Mumford, and that no compelling evidence reflected that he (Basinski) intended to terminate court employees for political reasons in the future, and therefore (according to defendant Basinski) no relief could be imposed against him to correct wrongs committed by a predecessor in office. On September 28, 1995, the district court dismissed Mumford's action as moot, ruling that no relief remained

available against either Basinski in his official capacity as the successor in office to Zieba, or Lorain County, Ohio as the public entity purportedly in interest. *Mumford v. Zieba*, 915 F.Supp. 917 (N.D. Ohio 1995).

A state court is not a "person" for purposes of 42 U.S.C. § 1983 and hence is not subject to lawsuit under that statute.[2] *Mumford*, 4 F.3d at 435 (*citing Foster v. Walsh*, 864 F.2d 416, 418 (6th Cir. 1988) (per curiam)). "Persons" exposed to legal liability under section 1983 include municipal corporations and other "bodies politic and corporate." *Foster*, 864 F.2d at 418 (*citing Monell v. Department of Social Services*, 436 U.S. 658, 688 (1978)). Under Ohio law, a *county* "is a body politic and corporate" which "is capable of suing and being sued . . . ." Ohio Rev. Code Ann. § 301.22 (Anderson 1992). By contrast, the United States Supreme Court has dictated that, unlike counties and municipalities, *state* governments, and their

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[2]Section 1983 provides, in pertinent segment:

> Every *person* who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

(Emphasis added).

arms, officers, and instrumentalities, are generally immune from private lawsuit in federal court by virtue of the Eleventh Amendment to the United States Constitution.[3]

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[3]The Eleventh Amendment dictates:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

This constitutional mandate has long been liberally construed by the Supreme Court to extend state immunity to federal suit to reach actions potentially initiated by any person against an unconsenting state, including causes inaugurated by a citizen or citizens of the subject state itself, as well as certain other classes of litigation. *E.g.*, *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1122-23 (1996); *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974); *see generally Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1138 (8th Cir. 1974) (citing multiple Supreme Court decisions).

Under certain limited circumstances, Congress, when acting under a proper constitutional grant of authority, may expressly abrogate the states' Eleventh Amendment immunity respecting enforcement of a particular statute. *See Seminole Tribe*, 116 S. Ct. at 1123-32; *Green v. Mansour*, 474 U.S. 64, 68 (1985); *Wilson-Jones v. Caviness*, 99 F.3d 203, 208 (6th Cir. 1996). However, Congress did not abrogate the states' Eleventh Amendment immunity from legal actions in federal court by enacting section 1983. *Quern v. Jordan*, 440 U.S. 332, 341 (1979); *In re Secretary of Dept. of Crime Control*, 7 F.3d 1140, 1149 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 2106 (1994); *Williams v. Missouri*, 973 F.2d 599, 600 (8th Cir. 1992) (per curiam).

Additionally, a state may waive its Eleventh Amendment immunity, usually via legislative enactment. *Wilson-Jones*, 99 F.3d at 206 n.1.

Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274, 280 (1977); *Moor v. Alameda*, 411 U.S. 693, 717-21 (1973); *accord Hutsell v. Sayre*, 5 F.3d 996, 998-99 (6th Cir. 1993), *cert. denied*, 510 U.S. 1119 (1994); *Hall v. Medical College of Ohio*, 742 F.2d 299, 301 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113 (1985).

The central inquiry confronting this appellate review is whether the Domestic Relations Court is a state of Ohio entity, or instead is an appendage of the Lorain County government, for section 1983 purposes. If the Domestic Relations Court is deemed a part of the state government, Eleventh Amendment immunity will shield it, and its officers in their official capacities, from section 1983 legal actions in federal court; if it is construed as an extension of the county government, the section 1983 claims against the office of Administrative Judge of that court may proceed as, in effect, an action against Lorain County. *Kentucky v. Graham*, 473 U.S. 159, 165 (1985).

In *Foster v. Walsh*, 864 F.2d 416 (6th Cir. 1988) (per curiam), this circuit mandated that an Ohio

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Ohio has statutorily waived its state sovereign immunity against certain *state court* actions by consenting to exposure to private litigations in the Ohio Court of Claims, subject to certain limitations and conditions. *See* Ohio Rev. Code Ann. § 2743.02 (Anderson Supp. 1995). This limited legislative renunciation of governmental immunity has no application to the instant action.

municipal court was *not* an arm of the municipality which it served, concluding that the court was a component of the state government and hence was insulated from private federal court litigation by the Eleventh Amendment:

> It cannot seriously be argued that an Ohio municipal court is indistinguishable from the municipal corporation in which it sits. The Akron Municipal Court is part of the Ohio state court system, established by the Ohio state legislature. Ohio Rev.Code § 1901.01. It is subject to the supervision of the Ohio Supreme Court. Ohio Const., Art. IV, § 5. The municipal court may not be abolished by the city council, nor may the council expand or restrict the court's jurisdiction. See *State ex rel. Cherrington v. Hutsinpiller*, 112 Ohio St. 468, 147 N.E. 647 (1925). The territorial jurisdiction of the Akron Municipal Court is not coextensive with the city limits of Akron. Ohio Rev.Code § 1901.02(B). The employees of the Akron Municipal Court are not city employees subject to the authority of the Akron Civil Service Commission. *Dugan v. Civil Service Commission of Akron*, 9 Ohio App.3d 218, 459 N.E.2d 618 (1983). *Foster*, 864 F.2d at 418-19.

Foster is existing precedent in this circuit and applies in the instant case. The Ohio Constitution commands that within the judicial system of that state:

There shall be a court of common pleas and such divisions thereof as may be established by law serving each county of the state. Any judge of a court of common pleas or a division thereof may temporarily hold court in any county. In the interests of the fair, im-partial, speedy, and sure administration of justice, each county shall have one or more resident judges, or two or more counties may be combined into districts having one or more judges resident in the district and serving the common pleas courts of all counties in the district, as may be provided by law.[4] Judges serving a district shall sit in each county in the dis-trict as the business of the court requires. In counties or districts having more than one judge of the court of common pleas, the judges shall select one of their number to act as presiding judge, to serve at their pleasure. If the judges are unable because of equal division of the

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[4]Ohio statutory law commands that each county shall have its own common pleas court, with one or more judges sitting in a particular county as designated by state law. Those judges must satisfy state imposed residency and law practice requirements, and shall be elected for the standard, state-created six-year term. Ohio Rev. Code Ann. § 2301.01 (Anderson Supp. 1995).

> vote to make such selection, the judge having the longest total service on the court of common pleas shall serve as presiding judge until selection is made by vote. The pre-siding judge shall have such duties and exercise such powers as are prescribed by rule of the supreme court.

Ohio Const. art. IV, § 4(A).

Additionally, the fundamental law of Ohio imparts supervisory authority over all courts of that state, and the authority to promulgate rules for all courts of that state, to the Ohio Supreme Court. Ohio Const. art. IV, § 5. The state constitution also dictates standards controlling the election, residency, tenure, compensation, and eligi-bility of every Ohio common pleas judge. Ohio Const. art. IV, § 6.

Like all Ohio common pleas court judge-ships, the six extant Lorain County Common Pleas Court judgeships were created by state statute, each having a six-year term commencing upon a statutorily fixed date. Ohio Rev. Code Ann. §§ 2301.01 (Anderson Supp. 1995) and 2301.02(B) (Anderson 1996 Bulletin # 5). Moreover, an Ohio statute decrees that a specific pair of the six common pleas judgeships in Lorain County shall constitute the domestic relations division for that county. Ohio Rev. Code Ann. § 2301.03(C) (Anderson 1996 Bulletin # 5).

Similarly, state statutes delineate the jurisdiction of the common pleas court. Ohio Rev. Code Ann. § 2305.01 *et seq.* (Anderson 1995 & Supp. 1995). Moreover, the authority to hire personnel, including referees, for the domestic relations courts is delegated by state statute to the courts themselves rather than to county administrations; such employees of the domestic relations courts are compensated from special court funds rather than from county treasury general revenues.[5] The Ohio Constitution directs that an unexpected vacancy in any state judicial position shall be temporarily filled by an appointee of the governor until a qualified successor is elected. Ohio Const. art. IV, § 13; *accord*, Ohio Rev. Code Ann. § 107.08 (Anderson 1994).[6]

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[5]Under Ohio Rev. Code Ann. § 2301.03(C) (Anderson 1996 Bulletin # 5), the judges of the Lorain County Domestic Relations Court exercise the powers of a juvenile court judge. Ohio Rev. Code Ann. § 2151.13 (Anderson 1994) empowers juvenile court judges in Ohio to appoint such "employees as are necessary and may designate their titles and fix their duties, compensation, and expense allowances." Such employees serve at the pleasure of the judge, and are compensated from the fund appropriated by the county for the operation of the court. *Id.; see also* Ohio Rules of Civil Procedure 53 (Anderson Supp. 1995) and 75(C) (Anderson 1994).

[6]*Cf.* Ohio Rev. Code Ann. § 305.02 (Anderson 1992) (governing appointments to fill vacancies in the offices of county commissioner, county prosecutor, county auditor, county treasurer, clerk of the common pleas court, county sheriff, county recorder, county engineer, or county coroner). The statute does not provide for a gubernatorial appointment to fill any vacancy in any of these offices under any

Furthermore, the Ohio legislature has compelled the county governments to provide support for the operation of the common pleas courts within their borders. For example, each board of county commis-sioners must provide a location for conducting sessions of court, Ohio Rev. Code Ann. § 305.22 (Anderson 1992), and must erect and sustain a courthouse where needed, Ohio Rev. Code Ann. § 307.01(A) (Anderson 1992). A state statute empowers the common pleas court to submit to the local board of county commissioners an annual written request for administrative expense funds which the court deems reasonably necessary; if, after conducting a public hearing on the court's funding request, the amount allocated by the county to the common pleas court is deemed insufficient by that court, the common pleas court may petition the state court of appeals, via a petition for a writ of mandamus under Ohio Revised Code Chapter 2731, for a judicial determination of the duty of the board of county commissioners to appropriate the additional funds in dispute. Ohio Rev. Code Ann. § 307.01(B) (Anderson 1992); *see also State ex rel. Morley v. Lordi*, 72 Ohio St. 3d 510, 511-12, 651 N.E.2d 937, 939 (1995) (a juvenile court, as a division of an Ohio common pleas court, may seek a writ of mandamus in the Ohio Supreme Court to compel a county board of commissioners to appropriate

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circumstances. Rather, such a vacancy shall be temporarily filled by an appointee selected at the county level.

funds necessary for the reasonable expenses of the court).

Consequently, an Ohio common pleas court is *not* a segment of county government, but an arm of the state for purposes of section 1983 liability and Eleventh Amendment immunity analyses.[7] Therefore, the instant

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[7]In so ruling, this court is cognizant of two Ohio appellate decisions from Franklin County which have mandated that, *for purposes of the state's statutory relinquishment of sovereign immunity and consent to be hailed into the Ohio Court of Claims under Ohio Rev. Code § 2743.02*, a court of common pleas shall *not* be deemed a part of the state government, and hence is not exposed to legal action in the state court of claims. *Dalton v. Bureau of Criminal Identification & Investigation*, 39 Ohio App.3d 123, 530 N.E.2d 35 (1987); *Tymcio v. State*, 52 Ohio App.2d 298, 369 N.E.2d 1063 (1977). These rulings were anchored in the applicable statutory definition of "state" contained in Chapter 2743 ("Court of Claims") of the Ohio Revised Code, which expressly excludes "political subdivisions" of the state. Ohio Rev. Code Ann. § 2743.01(A) & (B) (Anderson 1992). A "political subdivision" is statutorily defined to include "municipal corporations, townships, counties, school districts, and all other bodies corporate and politic responsible for governmental activities only in geographical areas smaller than that of the state to which the sovereign immunity of the state attaches." Ohio Rev. Code Ann. § 2743.01(B) (Anderson 1992). Stated differently, the "political subdivisions" of the state, as defined by section 2743.01(B), are those non-federal public entities which are functionally restricted geographically to areas smaller than the entire state, which units are at least partially independent of the state government, such as counties and cities. *See Mt. Healthy*, 429 U.S. at 280-81. The Ohio appellate tribunals in *Dalton* and *Tymcio* resolved that a common pleas court, although not a "political subdivision" in the ordinary meaning or in the strict sense of the statutory definition of that term, is sufficiently independent and distinct from the central state government to categorize it as a type of "political subdivision" of the state, shielding it from private suits in the state

claim against Basinski in his official capacity as the successor in office to Zieba as the Administrative Judge of the Domestic Relations Court cannot stand. *See Kentucky v. Graham*, 473 U.S. 159, 165 (1985).[8]

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court of claims. However, nothing in either opinion mandates that a common pleas court should be construed as a component of *county* government for *any* purpose. To the contrary, those courts intimated that, in the broader sense, the common pleas courts remain instrumentalities of *state* government. *Dalton*, 530 N.E.2d at 36; *Tymcio*, 369 N.E.2d at 1065. While this court expresses no view regarding the correctness of the lower appellate court rulings in *Dalton* and *Tymcio* as a matter of Ohio law, those decisions do not contradict, and indeed generally support, this court's ruling. *Accord*, *Dugan v. Civil Service Com'n of Akron*, 9 Ohio App. 3d 218, 459 N.E.2d 618 (1983) (an Ohio court is a creature of state constitutional and statutory law and is administered by state authorities; the state legislature has the authority to control the conditions of appointment, status, tenure, and discharge of court employees).

[8] In *Graham*, the Supreme Court pronounced:

> Official-capacity suits . . . "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, n. 55, 98 S.Ct. 2018, 2035, n. 55, 56 L.Ed.2d 611 (1978). *As long as the government entity receives notice and an opportunity to respond*, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.

Kentucky v. Graham, 473 U.S. at 165-66 (emphasis added) (citation omitted).

Therefore, the instant official capacity litigation is independently fatally defective because the state of Ohio had not been afforded timely

The state of Ohio is insulated from litigation exposure in federal court by the Eleventh Amendment to the United States Constitution.[9]

In the alternative, the case sub judice was properly dis-missed because Mumford's former position was, as a matter of law, not protected by the First Amendment. In *Mumford v. Zieba*, 4 F.3d 429 (6th Cir. 1993), this circuit recognized the Supreme Court's dictate that, in many circumstances, a public employee may not be dismissed

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notice and an opportunity to respond to the complaint.

It should also be noted that Mumford's cause against the named Administrative Judge in his official capacity as a state officer cannot be salvaged by invocation of the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). In *Ex parte Young*, the Court mandated that, at least in some cases, a claim solely for prospective injunctive relief restraining a state official from continuing an ongoing violation of federal law may not be barred from federal court by the Eleventh Amendment. *See Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1132 (1996); *Green v. Mansour*, 474 U.S. 64, 68 (1985). However, cases against a state officer in which a claim for retrospective relief for *past* violation(s) of federal law is joined, such as the action at issue, are not exempted from the Eleventh Amendment's jurisdictional bar. *Green*, 474 U.S. at 68.

[9]The lower court erroneously concluded that the "true remaining defendant" following the dismissal of Zieba in his official capacity was Lorain County. *Mumford v. Zieba*, 915 F.Supp. 917, 918 (N.D. Ohio 1995). If the claim against Zieba in his official capacity had indeed constituted a cause against *Lorain County*, the mere dismissal of the Domestic Relations Division as an improperly named party defendant would not have vitiated a claim against the county under section 1983.

because of his political beliefs or activities;[10] but a public employer may consider the political affiliation of a current or prospective employee "if political affiliation was an appropriate requirement for the effective performance of the public office involved." *Id.* at 433 (*citing Branti v. Finkel*, 445 U.S. 507, 515 (1980); *Elrod v. Burns*, 427 U.S. 347, 372-75 (1976)). Where a public occupation entails policymaking authority or a relationship of confidence with the employee's supervisor, the political beliefs and associations of a present or potential occupant of that position may appropriately be considered by the authority charged with making the employment decision. *Id.* at 433-34. Moreover, certain non-policymaking and non-confidential offices may also properly be deemed "political," and hence not protected by the First Amendment from patronage factors:

> ["]Under some circumstances, a position may be appropriately considered political even though it is neither confidential nor policymaking in character." *Branti*, 445 U.S. at 518, 100 S.Ct. at 1294. Thus, the Court abandoned the labels of "policy-maker" and "confidential employee," and stated that the relevant issue was "whether the hiring authority

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[10] *See, e.g., Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990) (resolving that low-level public employees are constitutionally protected from adverse employment consequences engendered by their political affiliation).

> can demonstrate that party affiliation is an appropriate re-quirement for the effective performance of the public office involved."[11]

Mumford, 4 F.3d at 434. *See also McCloud v. Testa*, 97 F.3d 1536, 1553 (6th Cir. 1996).

The effective performance of a subordinate "political" public office requires that the employee and supervisor maintain a viable working relationship, which includes confidence by the supervisor in the employee's political credentials and philosophy, as well as his intellectual and technical abilities. In the instant case, candidate Zieba had promised, if elected, to "clean house" at the Domestic Relations Court by eliminating Webber's support-ers from the court staff. As Zieba in essence campaigned against Webber *and* his appointees and supporters on the court staff (including Mumford, an active Webber supporter), Zieba could not expect to have a viable working relationship with, or much confidence in the political loyalty of, that court staff. Rather, friction and animosity were probable expectations, which would undermine any close working relationship between Zieba and the incum-

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[11] The Supreme Court recently reaffirmed this principle, and the *Elrod/Branti* analysis generally, in *O'Hare Truck Serv. v. Northlake*, 116 S. Ct. 2353, 2355 & 2357 (1996).

bent chief referee.[12]

In *Mumford v. Zieba*, 4 F.3d 433 (6th Cir 1993), this court lacked the occasion to directly address Mumford's former position as political versus non-political, but clearly *implied* that a court referee, of necessity, had a confidential relationship with the judge whom he served, which transformed political affiliation into an appropriate employment consideration.[13] *See id.* at 435. Generally, a government position is "political" if the office *either* (1) is inherently political because of its *general* duties, *or* (2) is effectively political because the *specific* duties assigned to a particular occupant of that office are of a political character. *Id.* at 432 n.8 (*citing Faughender v. North Olmsted, Ohio*, 927 F.2d 909, 913-14 (6th Cir. 1991)).

Although the inherent duties of a state public officer are generally delineated by state law, the unique

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[12] *See Mumford*, 4 F.3d at 434. Beyond party membership, "political affiliation" can signify "commonality of political purpose and support[.]" *Id.* at 433 n.9 (*citing Williams v. River Rouge*, 909 F.2d 151, 153 n.4 (6th Cir. 1990); *Balogh v. Charron*, 855 F.2d 356 (6th Cir. 1988)).

[13] *But see Baker v. Hadley*, 72 F.3d 129 (6th Cir. 1995) (Table), 1995 WL 717029 (unpublished per curiam) (characterizing the 1993 *Mumford* decision as squarely ruling that a chief referee was not insulated from patronage dismissal), *cert. denied*, 116 S. Ct. 1876 (1996).

duties of a particular office holder are typically fact driven. However, the characterization of the position's general *or* specific duties as nonpolitical or political is a question of law. *See McCloud v. Testa*, 97 F.3d 1536, 1546 (6th Cir. 1996); *Blair v. Meade*, 76 F.3d 97, 100 & n.2 (6th Cir. 1996). Accordingly, if, as a matter of law, the inherent duties of a referee in the service of an Ohio Domestic Relations Court are political in character, patronage considerations may justifiably influence or control the court's appointment to that post, and any claim initiated under 42 U.S.C. § 1983 by a former referee for alleged patronage discharge is nonviable as a matter of law.

Rule 75(C) of the Ohio Rules of Civil Procedure creates the basic inherent duties of a Domestic Relations Court referee. Rule 75(C) posits that "Rule 53 shall apply to all cases or issues directed [by the court] to be heard by a referee." As this court resolved in *Mumford*, 4 F.3d at 430 n.1:

> Pursuant to Ohio Rules of Civil Procedure 53 and 75, the court may appoint one or more referees to hear an issue or issues in any case in which the parties are not entitled to a trial by jury or in any case in which the parties consent in writing or in the record in open court, to submit an issue or issues to a court-appointed referee. A referee in the Domestic Relations Divis-

> ion of the Common Pleas Court is an agent and officer of the appointing court and is clothed with the powers and duties of the judicial office which appoints him.

(Citations omitted).

The powers of the referee include, *inter alia*, the conduct of hearings on the matters referred to him, the issuance of subpoenas, the swearing and examination of witnesses, and (unless otherwise specified in the order of reference) the promulgation of evidentiary rulings and the entry of certain pretrial, discovery, temporary restraining, and other orders necessary to regulate the proceedings, all without judicial ratification. Ohio R. Civ. P. 53(C)(2) & (3). However, the referee's decisions otherwise are mere recommendations which become effective only upon adoption by the court. Ohio R. Civ. P. 53(E)(4)(a).

Unquestionably, the inherent duties of an Ohio domestic relations court referee entail a relationship of confidence between the referee and the judge(s) which he serves. The referee is privy to confidential litigation materials and internal court communications in the discharge of his duties, and further maintains a personal confidential relationship with the judge(s) which he serves. *See Blair*, 76 F.3d at 101; *Balogh v. Charron*, 855 F.2d 356 (6th Cir. 1988). Moreover, the referee effectively makes policy for, or suggests policy to, the court on each

occasion that he resolves a dispute in the court's name or recommends a disposition to a judge. Consequently, his supervising judge must be convinced that the judgment capabilities of the referee, and the confidential relationships that arise as a result of the intimate judicial and quasi-judicial discussions, are unquestionable. The referee's political ideology, associations, and activities may rationally influence a judge's assessment of an individual's suitability for a position as his referee.

Since the hearing of this appeal, this circuit in *McCloud v. Testa*, 97 F.3d 1536 (6th Cir. 1996), out-lined four general categories of public occupations charac-terized as "political" which are validly subject to patronage considerations and therefore are not shielded by the First Amendment:

> **Category One:** positions specifically named in relevant federal, state, county, or municipal law to which dis-cretionary authority with respect to the enforcement of that law or the carrying out of some other policy of political concern is granted;
> **Category Two:** positions to which a significant portion of the total discretionary authority available to category one position-holders has been delegated; or positions not named in law, possessing by virtue of the jurisdiction's pattern or

> practice the same quantum or type of discretionary authority commonly held by category one positions in other jurisdictions;
>
> **Category Three:** confidential advisors who spend a significant portion of their time on the job advising category one or category two position-holders on how to exercise their statutory or delegated policymaking authority, or other confidential employees who control the lines of communications to category one positions, category two positions or confidential advisors; [and]
>
> **Category Four:** positions that are part of a group of positions filled by balancing out political party representation, or that are filled by balancing out selections made by different governmental agents or bodies.

Id. at 1557 (notes omitted).

The inherent duties of an Ohio domestic relations court referee, as illuminated above, satisfy the strictures of categories one, two, and three, as Ohio law expressly assigns some discretionary adjudicative authority to the referees, permits Ohio judges to delegate other adjudicative powers to the referees, and provides that the referees shall proffer advice (often in confidence) to the judges

concerning the disposition of cases and other legal controversies.

For these reasons, this court is constrained to rule that Mumford's former position as a referee for the Domestic Relations Court was an inherently political post which was not safeguarded from political patronage termination by the First Amendment, and therefore the plaintiff's official capacity claim under section 1983 must be rejected.

Finally, this appellate review considers the trial court's ruling that Mumford's request for equitable relief became moot upon the expiration of Zieba's judicial term and the assumption of the duties of Administrative Judge by Basinski. The district court decided that no relief remained available to Mumford because Zieba (the allegedly offending individual) was no longer a party to the lawsuit, and because no conclusive evidence indicated that Basinski (the sole remaining defendant) had followed, or intended to continue, the allegedly offensive employment practices of Zieba. *Mumford v. Zieba*, 915 F.Supp. 917, 918-19 (N.D. Ohio 1995) (*quoting Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 622 (1974)). The lower court's analysis constituted legal error.

In *Mayor of Philadelphia*, the Court dictated that no prospective coercive relief can issue against a current public official which is designed to forestall *future* discriminatory practices of a type committed by the

official's *predecessor in office*, in the absence of findings that the successor official intends to continue his predecessor's discriminatory practices. 415 U.S. at 622. This rule has no application in the instant case. Mumford's cause of action against Zieba sought relief from *alleged past unconstitutional employment discrimination against him*, not to preclude perpetration of similar discriminatory practices against others in the future. Federal Rule of Civil Procedure 25(d) provides for the automatic substitution of a successor public official upon the departure from office of a person named in official capacity litigation:

> (1) When a public officer is a party to an action *in his official capacity* and during its pendency dies, resigns, or otherwise *ceases to hold office, the action does not abate and the officer's successor is automatically substituted as a party*. Pro-ceedings following the sub-stitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.
> (2) *A public officer who sues or is sued in an official capacity may be described as a party by the officer's official title rather*

> *than by name*; but the court may require the officer's name to be added.

(Emphases added).

The Supreme Court has observed that "[t]he rules effectuating automatic substitution of public officers were specifically designed to prevent suits involving public officers from becoming moot due to personnel changes. See Advisory Committee Notes on 1961 Amdt. to Fed.Rule Civ.Proc. 25(d)(1), 28 U.S.C., pp. 568-569." *Karcher v. May*, 484 U.S. 72, 83 (1987). Because Mumford's action against Zieba as the Administrative Judge of the Domestic Relations Court was effectively a claim against the *office* of Administrative Judge, *see* Fed. R. Civ. P. 25(d)(2), the claim (if otherwise valid) would survive Zieba's departure from the bench. *See, e.g., Torres v. Toledo*, 586 F.2d 858, 859-60 (1st Cir. 1978). Consequently, the substitution of Basinski in Zieba's stead did not render Mumford's cause against the Administrative Judge of the Domestic Relations Court moot. Rather, as developed above, Mumford's official capacity case must be dismissed on the alternate rationales that (1) the Eleventh Amendment precluded it as a jurisdictionally improper claim against a state government prosecuted in federal court, and (2) the First Amendment as a matter of law did not protect Mumford's former position as a court referee.

Accordingly, although this review rejects the reasoning of the district court, it hereby **AFFIRMS**, for the foregoing reasons, the judgment of September 28, 1995 dismissing the plaintiff's complaint.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION AND SUGGESTION FOR REHEARING EN BANC

Sixth Circuit Case №. 95-4127
Filed February 6, 1997

CASE Nº 95-4127

In The
United States Court of Appeals
For The Sixth Circuit

DAVID M. MUMFORD,
Plaintiff-Appellant,

v.

DAVID A. BASINSKI,
Defendant-Appellee,

PETITION and SUGGESTION FOR REHEARING
EN BANC

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF OHIO
AT YOUNGSTOWN

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC
In the United States Court of Appeals
For the Sixth Circuit

REQUIRED STATEMENT FOR REHEARING EN BANC

I express a belief, based on a reasoned and studied professional judgment, that the panel decision (attached) is contrary to the following decision(s) of the Supreme Court of the United States and the United States Court of Appeals for the Sixth Circuit and that consideration by the full Court is necessary to secure and maintain uniformity of decisions:

Ex Parte Virginia, 100 U.S. 339, 348 (10 Otto) 25 L.Ed.676 (1879)
Ex Parte Young, 209 U.S. 123 (1908)
Johnson v. Jones 115 S.Ct. 2151 (1995)
Seminole Tribe of Florida v. Florida, 116 S.Ct.1114, 1132 (1996)
Pembaur v. City of Cincinnati, 746 F.2d 337, 341 (6th Cir., 1984) 475 U.S. 469, rev'd on other grounds (1984)
Guercio v. Brody, 814 F.2d 1115, 1119 (6th Cir., 1987)
Morrison v. Lipscomb, 877 F.2d 463, 465 (6th Cir., 1989)
Faughender v. City of North Olmsted, 927 F.2d 909 (6th Cir., 1991)
Mumford v. Zieba, 4 F.3d 429, 435 (6th Cir. 1993)

I express a belief, based on a reasoned and studied professional judgment, that the panel decision involves one or more questions of exceptional importance:

1. Whether the panel's decision in granting complete immunity and unreviewable discretion to County Court judges in their administrative capacity as final policymakers for Lorain County regarding employment matters for any constitutional torts they commit is an overly broad scope to the 11th Amendment immunity?

2. Whether the panel's decision affirming the district court, on grounds other than mootness, denied the Petitioner fundamental fairness since the decision was based on issues which were not allowed to be briefed and the full record had not been certified to the Court?

3. Whether political affiliation is an inappropriate consideration in the employment of a referee of the Domestic Relations Division of the Lorain County Court of Common Pleas?

/s/ Dennis J. Niermann
ATTORNEY OF RECORD FOR
DAVID M. MUMFORD

INTRODUCTION

Petitioner David M. Mumford respectfully petitions this Court for a hearing or rehearing en banC, relating to the recommended published opinion in this case filed on January 23, 1997(attached).

PURPOSE OF PETITION

The January 23, 1997 opinion by Circuit Judge Krupansky, joined in by Circuit Court Judges Boggs and Siler held:

> (a) that the 11th Amendment gives total and absolute immunity to Ohio County Common Pleas Court Judges acting in their Administrative Capacities as Final Policymakers for Lorain County regarding employment matters;
>
> (b) alternatively, that a Chief Referee's Position in the Ohio County Court of Common Pleas is not protected by the First Amendment.

It is respectfully contended that giving the 11th Amendment such a broad sweep is a question of significant wide-ranging importance deserving of review by the entire

court. It is also respectfully contended that the analysis by the panel as to the Chief Referee's position is incorrect as a matter of fact and as a matter of law.

STATEMENT OF THE CASE

Following his termination, Petitioner Mumford filed an action against Judge Joseph C. Zeiba, in his individual and official capacity, and the Lorain County Common Pleas Court, Domestic Relations Division under 42 U.S.C. §1983 alleging violations of the First and Fourteenth Amendments. Judge Krenzler in Mumford v. Zieba, 788 F.Supp. 987, (N.D., Ohio, 1992), denied Judge Zieba's motion for qualified immunity. Mumford v. Zieba, 4 F.3d 429, 435 (6th Cir. 1993) reversed Judge Krenzler as to "qualified immunity" only, and dismissed the claims against Judge Zieba in his individual capacity and against the Domestic Relations Court, and remanded the case to the district court for adjudication of Plaintiff's claims against Judge Zieba in his official capacity as Judge of the Lorain County Common Pleas Court. Id. Judge Basinski filed a motion to dismiss arguing the case was moot and Judge Economus entered such judgment for the Defendant on September 25, 1995. The panel decision Petitioner seeks to be reviewed agreed with Petitioner that the case was not moot (pp. 17-19), however, without briefs or any record as to the issues of 11th Amendment immunity or whether the position in question was protected, decided alternatively, that the 11th

Amendment barred Petitioner's action, or that the Chief Referee position was a political unprotected position.

GROUNDS FOR REHEARING

POINT I

Whether the panel's decision in granting complete immunity and unreviewable discretion to County Court judges in their administrative capacity as final policymakers for Lorain County regarding employment matters for any constitutional torts they commit is an overly broad scope to the 11th Amendment immunity?

The panel's decision in granting complete immunity and unreviewable discretion to County Court judges in their administrative capacities as final policymakers for Lorain County regarding employment matters for any constitutional torts they commit is an overly broad scope to the 11th Amendment immunity.

To allow this decision to stand will mean that every county and municipal court judge in Ohio, Tennessee, Michigan and Kentucky, acting administratively as an employer and not in his/her judicial capacity, will now have the unfettered ability to hire and fire, using political motivation, for any position, which removes the constitutional safeguards of Branti v. Finkel, 445 U.S. 507

(1980) and Rutan v. Republican Party of Illinois, 110 S.Ct. 2729 (1990) from all court employees, **whether they be referees or maintenance workers** due to this overbroad and invasive interpretation of the 11th Amendment.

Williams v. Butler, 863 F.2d 1398, 1403 (8th Cir., 1988) involved a 1983 action against a municipal court judge in his official capacity, where the Court ruled that the local government was liable for the unconstitutional actions of the judge because the municipality had delegated final policy making authority to that judge over all hiring and firing. Pembaur v. City of Cincinnati, 746 F.2d 337, 341 (6th Cir., 1984) 475 U.S. 469, rev'd on other grounds (1984), ruled that "...the Board's lack of control does not necessarily preclude a finding of liability on the part of the County. We must determine whether the nature and duties of the Sheriff are such that his acts may fairly be said to represent the County's official policy with respect to the specific subject matter." This Court, at page 5 of the attached opinion, framed the central inquiry as "whether the Domestic Relations Court is a state of Ohio entity, or instead is an appendage of the Lorain County government, for 1983 purposes." The inquiries done by this Court in the instant case and the inquiry by the Pembaur Court are dissimilar. The nature of Judge Zieba's administrative duties and status as a final policymaker for Lorain County regarding employment matters as opposed to his judicial duties was never discussed by the instant panel.

The U.S. Supreme Court addressed this distinction in Forrester v, White, 108 S.Ct. 538 (1988), a 1983 case involving the firing of a Probation Officer by a state court judge. The Forrester Court, at 545, ruled that "...it was the nature of the function performed, not the identity of the actor who performed it, that informed our immunity analysis.[1] At 544, the Forrester Court also pointed out that "[a]dministrative decisions, even though they may be essential to the very functioning of the courts, have not similarly been regarded as judicial acts." See Guercio v. Brody, 814 F.2d 1115, 1119 (6th Cir., 1987) [finding the firing of Guercio to be administrative and "hardly the type of act performed only by judges"]; and Morrison v. Lipscomb, 877 F.2d 463, 465 (6th Cir., 1989) ["the reason for the decision in Forrester is clear. A judge is not taking a judicial act when he fires his personnel. He is acting as an employer who is also a judge."] Many of these cases cite Ex Parte Virginia, 100 U.S. 339, 348 (10 Otto) 25 L.Ed.676 (1879) for the proposition that the U.S. Supreme Court recognized the distinction between judicial and administrative acts over a century ago:

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[1] This Court, however, let the identity of the actor, Judge Zieba, rather than the identity of the function (final policymaker with hiring and firing authority over Lorain County employees) control its analysis.

> **Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent.**[2] Whether he was a county judge or not is of no importance.

The analysis of the instant panel, however, was that "...an Ohio common pleas court is not a segment of county government..." (p.9) Whether the "court" is a segment of county government is, as has been demonstrated above, not the issue. The issue is, in acting as an "employer" in his "administrative capacity", was Judge Zieba, in his official capacity, acting as a final policymaker for Lorain County over its employees. This Pembaur type analysis was not done in this case. This decision was arrived at without a full briefing, in spite of the fact that in the record was testimony by Herbert Jacoby, President of the Lorain County Commissioners, that Lorain County Referees receive their paychecks from Lorain County (not the state). [Deposition of Herbert Jacoby, R. 111; JAP 298.]

Lorain County and Judge Zieba (Basinski) have always been represented by the Lorain County Prosecutor. Attached Ohio Attorney General's Opinion No. 88-055 finds that common pleas court judges are county officers, and are required to be represented by county prosecutors

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[2] Emphasis in original.

and finds that common pleas court judges are employees of the county in which they serve.

Another attached Ohio Attorney General's Opinion No. 85-014 addresses the issue of the obligation of a County Prosecutor to represent a county judge, and finds that such an obligation exists when the county official is sued in their "official capacity." These two Ohio Attorney General opinions make it clear that the Administrative Judge, acting in his or her official capacity in administrative matters, are county officials, and must receive county representation from the county prosecutor, as have the administrative judges in the instant *Mumford* matter throughout this litigation by the Lorain County Prosecutor.

Allowing the analysis in this panel's opinion to stand will have the effect of reducing the "local government" exception to the 11th Amendment as expressed in Monell v. Dept. of Soc, Serv. of City of N.Y. 98 S.Ct. 2108 (1978) to a nullity for every county court and city court employee in Ohio, Tennessee, Kentucky and Michigan, whether they be maintenance workers or Chief Referees.

POINT II

Whether the panel's decision affirming the district court, on grounds other than mootness, denied the Petitioner fundamental fairness since the decision was based on issues

which were not allowed to be briefed and the full record had not been certified to the Court?

The questions decided by the panel are important and effect the entire judicial branch of government when acting in its administrative role as employer. The Petitioner had no opportunity to discuss these issues in his initial brief since the only issue on appeal related to the question of mootness. Since Mr. Mumford never had a full opportunity to respond to these issues, with a full record before this Court, to decide these questions of law "would be unfair to ...[him] and would risk an improvident or ill-advised opinion on the legal issues raised." Hunt v. Nuth, 57 F.3d 1327, 1338 (4th Cir. 1995).

While the fairness of an appellate court affirming a decision on grounds other than those raised on appeal has not been reached by this Circuit or any other court based on the research for this Petition, there are a number of analogous situations which support the Petitioner's position. For example, before summary judgment may be granted against a party, this Circuit and all other U.S. Courts of Appeal mandate that the party opposing summary judgment be afforded notice and a reasonable opportunity to respond to all issues to be considered by the court. Beck v. Borden, Inc., 724 F.2d 44 (6th Cir. 1984); Kistner v. Califano, 579 F.2d 1004, 1005 (6th Cir. 1978)(per curiam); Winbourne v. Eastern Air Lines, Inc., 632 F.2d 219 (2d Cir. 1980);

Management Investors v. United Mine Workers of America, 610 F.2d 384 (6th Cir. 1979). This is considered to be a fundamental requirement under our system.

Another similar situation supported by the majority of circuits is that where an issue is first argued in a reply brief it is consider not properly before a Court of Appeals. United States v. Caicedo-Llanos, 960 F.2d 158, 164 (D.C. Cir. 1992)), cert. *denied,* 116 S. Ct. 724, 133 L. Ed. 2d 676 (1996); 9 James Wm. Moore, Moore's Federal Practice P 228.02 [2-3] (1995) ("The case law is to the effect that the appellant cannot raise new issues in a reply brief . . . ."). Just like the instant case, raising an issue when the other party has no opportunity to respond would be totally unfair and such a tactic has been rejected.

A final example, relates to F.R.A.P. Rule 3 on the type of notice required to give appellate jurisdiction over an issue. In determining whether the notice is adequate, courts usually examine "whether the affected party had notice of the issue on appeal; and . . . whether the affected party had an opportunity to fully brief the issue." Lynn v. Sheet Metal Workers' Intl. Ass'n, 804 F.2d 1472, 1481 (9th Cir. 1986); Badger Pharmacal, Inc. v. Colgate-Palmolive Co., 1 F.3d 621, 625 (7th Cir. 1993). Levald, Inc. v. city of Palm Desert, 998 F.2d 680, 691 (9th Cir. 1993).

In the present case, the Petitioner had no chance to argue the merits of this case to the panel. The panel had the option of requesting a briefing on these issues by the parties and requesting that the full record of this hotly litigated matter be sent from the district court. In failing to permit a full inquiry, it is the Petitioner's contention that the panel did not have crucial evidence in the record in making its decision. Thus, the Petitioner was taken by surprise and prejudiced by the actions of the panel. Accordingly, the panel should permit the Petitioner to designate other parts of the district court's record and be permitted to fully brief and argue the merits of these alternative grounds. Only with such a ruling can the unfair surprise and prejudice be overcome.

POINT III

Whether political affiliation is an inappropriate consideration in the employment of a referee of the Domestic Relations Court?

Judge Krenzler, using the guidance of this Court, relying on the case of Faughender v. City of North Olmsted, 927 F.2d 909 (6th cir., 1991), made a **record-based** analysis of whether the position Mr. Mumford held was a political position. In Mumford v. Zieba, 788 F. supp. 987, 991 (N.D., Ohio 1992) the district court wrote:

> The Sixth Circuit Court of Appeals has held that, to determine whether political affiliation is an appropriate consideration for a particular position, the court must examine the inherent duties of the position and the duties that the new holder of the position will perform. If the tasks are political or policy-oriented, involve access to confidential and political material, or demand political loyalty, then political considerations are appropriate. Faughender v. City of North Olmsted, 927 F.2d 909, 913-14 (6th Cir., 1991). Plainly, this is a factual inquiry which relates to the objective reasonableness of Judge Zieba's dismissal of Mumford, and not to the question of whether the law was clearly established.[Emphasis added.]

Then, at Id., 992, Judge Krenzler, writing for the District Court, and having reviewed the entire record that was before him, wrote:

> Given the scope and independence of the referees' duties to the Court as a whole, their lack of participation in decisions concerning Court policy, and their lack of actual access to confidential material and communications, Judge Zieba could not have reasonably believed that political affiliation was an appropriate consideration in the employment of a referee of the Domestic Relations Court. [n.2

> The result in this case probably would have been differed if each referee was assigned to work with a single judge. In such a case, the referee's position would be similar to the position of the personal staff members at issue in Balough and Faughender, whose close working relationship with an elected official required confidentiality and political loyalty.]

Judge Krenzler's finding as to whether the position Mr. Mumford held was political or not was not limited to "qualified immunity."[3]

Judge Krenzler followed the dictates of Faughender, and made a factual analysis based on the record before him, to find that the inherent duties are not political for the specific position held by the Petitioner at the time of his firing.

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Judge Krenzler found at 788 F. Supp. 987, 992 (N.D., Ohio, 1992), after ending his discussion of qualified immunity in § II. of his opinion, and began his next, new, separate section as follows:

III. CONSTITUTIONALITY OF PATRONAGE DISMISSAL OF REFEREE

As this Court noted above, political affiliation is not an appropriate consideration in the employment of a referee of the Domestic Relations Court.

This issue has never been briefed to this Court, this Court did not have a complete record on this vital issue of whether the position was political or not before it, due to the fact that this was a limited mootness appeal. In Mumford v. Basinski, No. 95-4127 (1997), at 14, the panel wrote that "[a]lthough the inherent duties of a state public officer are generally delineated by state law, the unique duties of a particular office holder are typically fact driven."[4] So far, this Court's decision is in line with its previous decision in Faughender . The very next sentence, however, then contradicts prior law and holds that "[h]owever, the characterization of the position's general or specific duties as nonpolitical or political is a question of

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[4] This Court in Faughender v. City of North Olmsted, Ohio, 927 F.2d 909, 913 (6th Cir., 1991) wrote that "[b]y declaring Faughender's position to be 'confidential' based on its close working relation with the mayor's office, the district court failed to closely examine the actual duties and the political requirements, if any, of her position in 1991 that a close examination of actual duties is required. This is an analysis that Judge Krenzler did with the entire record before him, and that this panel did not do. This panel, again, did not have the entire record of "actual" duties before it that Judge Krenzler had before him. Therefore, the opinion Petitioner seeks to be reviewed conflicts not only with Faughender, but also with Branti v. Finkel, 445 U.S. 507 (1980).

law.[5] See McCloud v.Testa, 97 F.3d 1536, 1546 (6th Cir., 1996); Blair v. Meade, 76 F.3d 97, 100 & n.2 (6th Cir. 1996)."

The difference between examining "inherent duties" on a fact driven basis as described by Faughender and "characterizing" a positions "general or specific" duties as outlined by this Court in Mumford v. Basinski is extremely confusing, convoluted, contradictory and unclear.[6]

5

This raises a crucial question. When reviewing the fact driven inherent duties of a Lorain County referee, as opposed to any referee in Ohio, Judge Krenzler, with a complete record before him, determined that, based on the fact that Lorain County referees report at the same time to two judges (with the referees and the judges both being from different parties and factions), their inherent duties cannot be said to require partisan political loyalty to either party or faction. Additionally, the administrative judgeships alternated every year between Zieba, a Republican and Basinski, a Democrat. This panel chose to ignore these specific record based facts and make its decision on a generalized concept of what a Lorain County referee's duties might be. This violates the letter and spirit of Faughender and Branti.

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In addition, this Court wrote in its first opinion on this case, in Mumford v. Zieba, 4 F.3d 429, 432 (6th Cir., 1993) that "the issue of confrontation in this appellate review is not whether Judge Zieba actually violated Mumford's First and Fourteenth Amendment rights--an issue of fact implicating the merits of plaintiff's claim and reserved for

What is clear, however, is that Circuit Judge Ryan, dissenting in Blair v. Meade, 76 F.3d 97, 102 (6th Cir., 1996), discussed the extent to which a Circuit Court may go in reviewing interlocutory trial court decisions denying qualified immunity. Although the Mumford v. Basinski court in the decision for review herein did not need to review qualified immunity, Judge Ryan's dissent raises a point equally applicable in this case. In his dissent Judge Ryan, citing Johnson v. Jones, 115 S.Ct. 2151 (1995) points out that

> The Johnson opinion simply held that a defendant may not immediately appeal a district court's order denying him the defense of qualified immunity when the order is based on a determination that the pretrial record sets forth a

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the trier of fact." [Emphasis added.] The prior panel, at Id., n. 8, also wrote that "the district court evaluated the inherent duties of a referee concluding that there was no genuine issue of fact that a referee was not a policymaker or confidential employee and thus entitled to First Amendment protection--a conclusion which addresses the merits of plaintiff's claim rather than the issue of qualified immunity. See Faughender v. North Olmsted, Ohio, 927 F.2d 909-913-914 (6th Cir., 1991)(court must examine the inherent duties...to determine whether political affiliation is an appropriate consideration for appointment to a particular vacancy." Thus, the panel in this case violated its prior ruling in that it decided, with an incomplete record before it, an issue "reserved for the trier of fact."

genuine issue of fact for trial. The Court did not indicate that a court of appeals may ignore the factual basis for the trial court's decision and, instead, ferret out a legal issue, and then reverse on legal, rather than factual, grounds.

This is exactly what the Mumford v. Basinski panel did in this case. They acknowledged that the decision was a fact based decision, that Judge Krenzler made the fact-based decision in line with Faughender, and then they ferreted out the new test: whether the record based factual finding of Judge Krenzler somehow missed the simple legal distinction: that the legal issue is whether "..the characterization of the position's general or specific duties are nonpolitical or political." This is inconsistent with Faughender, a case that has not been reversed or modified.

The panel obviously ignored the fact that both Judge Basinski and Judge Zieba testified, as the successor Judges under Faughender, that the position, specifically and generally, was not a political position. [See R. 29, Deposition of Zieba: JAP 608-609; see also R.111, Deposition of Judge Basinski; JAP 308-309.][7] Faughender v. City of North Olmsted, Ohio, 927 F.2d 909, 915 (6th

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7 These deposition excerpts from the Joint Appendix are attached.

Cir., 1991) clearly states that "[p]ermitting elected officials entrusted with administrative duties to reorganize their staffs according to their[8] wishes is also derived from Elrod and Branti." Both Zieba and Basinski as successors to Petitioner's former employer, for whom he worked for 10 years, elected, under Faughender, to organize their staffs according to their wishes, and to maintain the positions of all referees as non-political. The decision of the panel, however, takes that right away from them, superimposing its own rationale for how the position should be characterized and organized.

CONCLUSION

This Court should allow Petitioner to brief and argue the positions it took as to the 11th Amendment and the 1st and 14th Amendments. This opportunity will permit the parties to address important parts of the record and raise legal and policy arguments which need to be advanced for protecting the right of court employees to be protected under the 1st Amendment.

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8 Emphasis added.

Respectfully Submitted,

/s/ Dennis J. Niermann, Esq. [I.D.# 00798
Edward G. Kramer, Esq.[I.D.# 0024873]
KRAMER & NIERMANN, L.P.A.
7214 Prospect Ave. East
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(216) 431-5300

CERTIFICATE OF SERVICE

Two copies of Plaintiff-Appellant's Motion for Rehearing and Rehearing En Banc were sent, this 6th day of February, 1997 to the following:

Mr. M. Robert Flanagan, Esq.
Office of the Lorain County Prosecuting Attorney
226 Middle Avenue
3rd Floor
Elyria, Ohio 44035

and

Richard 0. Wuerth, Esq.
LANE, ALTON & HORST
175 S. Third Street
Columbus, Ohio 43215

Katie Thorp Van Hooser
LEGAL ADVANTAGE
Suite 200
432 Walnut Street
Cincinnati, Ohio 45202

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER DENYING PETITION
FOR REHEARING EN BANC

Sixth Circuit Case Nº. 95-4127
Filed March 7, 1997

No. 95-4127

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID M. MUMFORD,)
Plaintiff-Appellant)
)
v.) ORDER
)
DAVID A. BASINSKI,)
Defendant-Appellee.)

BEFORE: KRUPANSKY, BOGGS, and SILER, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

/s/ Leonard Green, Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MEMORANDUM OF OPINION AND ORDER

Case No. 1:90 CV 2243
Filed March 31, 1992

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID M. MUMFORD, *Plaintiffs*, VS. JOSEPH C. ZIEBA, et al. *Defendants.*	) Case No. 1:90-CV-2243) SENIOR JUDGE:) ALVIN I. KRENZLER)) MEMORANDUM OF OPINION) and Order Denying) Plaintiff's and) Defendants' Cross-Motion) For Summary Judgment

This case is before this Court on the cross-motions for summary judgment filed by plaintiff, David M. Mumford, and by defendants, Judge Joseph C. Zieba and the Lorain County Common Pleas Court, Domestic Relations Division ("Domestic Relations Court").

In his complaint, Mumford claims that he is entitled to declaratory and injunctive relief and damages under 42 U.S.C. § 1983 because he was discharged from his position as a referee of the Domestic Relations Court based on his political affiliations, in violation of his rights under the first and fourteenth amendments to the United States Constitution. Mumford's motion for summary judgment asserts that the evidence shows that he was discharged because of his political affiliations, and that the first and fourteenth amendments protected him from such a patronage dismissal as a matter of law.

In their motion for summary judgment, Judge Zieba and the Domestic Relations Court contend that they did not discharge Mumford because of his political affiliations. They also argue that the first and fourteenth amendments did not protect Mumford from dismissal because political affiliation was an appropriate requirement for his position as referee. Finally, Judge Zieba argues that he is entitled to qualified immunity from Mumford's damages claims because the law did not clearly establish whether Mumford could be discharged based on his political affiliations.

The Court finds that material issues of fact preclude summary judgment for Judge Zieba on the issue of qualified immunity. At the time of Mumford's dismissal, it was clearly established that a governmental employee could not be discharged because of his political affiliation unless political affiliation was an appropriate requirement for the performance of the public office involved. Judge Zieba could not have reasonably believed that political affiliation was an appropriate requirement for the position of referee of the Domestic Relations Court. However, there is conflicting evidence as to whether political affiliation was a substantial or motivating factor in Judge Zieba's dismissal of Mumford. This material issue of fact precludes this Court from determining whether Judge Zieba could reasonably have believed that his dismissal of Mumford was lawful in light of the clearly established law.

In addition to the conflicting evidence regarding the reasons for Mumford's discharge, there are also genuine issues of material fact as to whether Judge Zieba acted under color of state law, and whether any constitutional violation resulted from a policy of custom of the Domestic Relations Court. These genuine issues of material fact also preclude summary judgment for any party on the merits of Mumford's complaint.

I. FACTS

The evidentiary materials submitted by the parties disclose the following facts. Mumford was a referee of the Domestic Relations Court from January 22, 1979 until January 2, 1989. Throughout that time he was a registered Democrat.

In 1988, Mumford assisted Judge Henry T. Webber's campaign for reelection to the Domestic Relations Court, which was opposed by defendant Judge Zieba. During the campaign, Judge Zieba told Mumford, Don't get caught in the cross-fire."

Judge Zieba defeated Judge Webber in the November, 1988 election. On December 22, 1988, Judge Zieba sent Mumford the following letter:

> Dear Mr. Mumford:
> Please be advised that my term of office as Judge, Lorain County Domestic Relations Court, con-

mences on Tuesday, January 3, 1989. I wish to advise you that you will not be retained and your services will not be required at that time.

Thus, Mumford was terminated on the date Judge Zieba took office. Thirteen other court employees were discharged at the same time. Two new referees, both registered Republicans, replaced Mumford.

In answers to interrogatories, defendants identified six reasons for the termination of Mumford's employment:

1) The leg ability to terminate.

2) Substandard job performance, conduct and attitude.

3) Substandard professional reputation as referee in the legal community.

4) The position of referee required confidence, loyalty and policy making. Continued employment of the Plaintiff would be detrimental to the smooth, efficient, and just administration of the Domestic Relations Court.

5) Not wanting the Plaintiff to continue to be a member of the staff of the Domestic Relations Court.

6) Defendant's opinion of the Plaintiff, in the Defendants official capacity as Administrative Judge of the Lorain County Court of Common Pleas, Domestic Relations Division.

In his deposition testimony, Judge Zieba stated that he did not believe that Mumford could be loyal to him because he had been loyal to Judge Webber. Although he did not personally observe Mumford performance, lawyers had told Judge Zieba that Mumford was immature and that he displayed temper tantrums in court. Judge Zieba further stated that the backlog of cases before the court indicated that Mumford, the other referee, and Judge Webber had not performed effectively.

Under Ohio law, referees are appointed by the court. Ohio R.Civ. P. 53(A). The duties of a referee are described in Rules 53 and 75 of the Ohio Rules of Civil Procedure. Under these rules, a referee has the power to hear any issues referred to him by the court, to regulate all proceedings before him, to subpoena witnesses, rule on the admissibility of evidence, swear and examine witnesses, and report to the court on the matters referred to him. The referees report is not a final decision of the court. Rather, the parties have an opportunity to object to the report, and the court may then either adopt, reject or modify the report, hear additional evidence, return the matter to the referee with instructions, or hear the matter itself.

Several present and former referees of the Domestic Relations Court testified in depositions that their responsibilities are largely independent of the judges for whom they work. They do not have daily, face-to-face contact with the judges. At most, they may spend an hour or two per week consulting with the judges about the cases they are handling. They do not participate in court decisions about employment, funding, or other policy issues. They have separate offices, and are not privy to confidential materials in the judges' chambers.

II. QUALIFIED IMMUNITY

In his motion for summary judgment, Judge Zieba contends that he is entitled to qualified immunity from Mumford's claim for damages because the law did not clearly establish whether Mumford could be terminated from his position as referee based on his political affiliations.

Judicial officers may be either absolutely or qualifiedly immune from civil liability for damages. A judicial officer is absolutely immune from liability for judicial acts within his jurisdiction. Cleavinuer v. Saxner, 474 U.S. 193 (1985). However, where, as here, the judicial officer is being sued for administrative acts, not for judicial acts, absolute immunity does not apply. Forrester v. White, 484 U.S. 219 (1988). Under these circumstances, a judge, like any government official, may assert qualified immunity from liability.

A government official is qualifiedly immune from liability for damages to a plaintiff who claims that the official violated his constitutional rights if it was objectively, legally reasonable for the official to conclude that his actions were lawful, in light of the clearly established law and the information he possessed at the time. Anderson v. Creighton, 483 U.S. 635, 641 (1987). This test requires a two-part inquiry by the Court. First, the Court must determine whether the law clearly established the right which the plaintiff claims that the defendant violated. If the law was not clearly established, then the official is qualifiedly immune from liability. Mitchell v. Forsyth, 472 U.S. 511 (1985). On the other hand, if the law was clearly established, then the Court must proceed to the second part of the inquiry, and determine whether it was objectively reasonable for the defendant to conclude that his actions were lawful, in light of that clearly established law. Anderson, 483 U.S. at 641.

A. Clearly Established Law.

A plaintiff bears the burden of proving that the defendants conduct violated clearly established law. Danese v. Asman, 831 F.2d 673 (6th Cir. 1987). While it is not necessary for the plaintiff to show that the official's precise action have been held unlawful in the past, the unlawfulness of the official's actions must have been apparent under pre-existing law. Anderson, 483 U.S. at 640. In other words, "[t]he contours of the right must be sufficiently clear

that a reasonable official would understand that what he is doing violates that right." Id.

In this case, Mumford asserts that it was clearly established that the first and fourteenth amendments to the United States Constitution protected government employees from discharge based upon their political affiliation. Rutan v. Republican Party of Illinois, ___ U.S. ___ , Ill L.Ed.2d 52 (1990); Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976). The Supreme Court has held that political patronage practices including politically motivated discharges, promotions, transfers, and recalls after layoffs -- are generally unconstitutional because they infringe on the protected speech and associational rights of government employees. Rutan, 111 L.Ed. 2d at 67; Elrod, 427 U.S. at 358-60. However, an individual employee's first amendment rights may be outweighed by the need to maintain governmental effectiveness and efficiency when the employee's private political beliefs would interfere with the discharge of his public duties." Branti, 445 U.S. at 517. Accordingly, a governmental employee may be discharged because of his political affiliation if "party affiliation is an appropriate requirement for the effective performance of the public office involved." Id., at 518.

The Court finds that, at the time Judge Zieba decided to dismiss Mumford, it was clearly established that Mumford could not be discharged based upon his political affiliation unless political affiliation was an appropriate

requirement for the position of referee of the Domestic Relations Court. Judge Zieba argues that it was not clearly established whether political affiliation was an appropriate requirement for the position of referee. However, the question whether political affiliation is an appropriate requirement for a particular position is a question of fact, not of law. Soderbeck v. Burnett County, Wisconsin, 752 F.2d 285, 288-89 (7th Cir. 1985). The Sixth Circuit Court of Appeals has held that, to determine whether political affiliation is an appropriate consideration for a particular position, the court must examine the inherent duties of the position and the duties that the new holder of the position will perform. If the tasks are political or policy-oriented, involve access to confidential and political material, or demand political loyalty, then political considerations are appropriate. Faughender v. City of North Olmsted, 927 F.2d 909, 913-14 (6th Cir. 1991). Plainly, this is a factual inquiry which relates to the objective reasonableness of Judge Zieba's dismissal of Mumford, and not to the question whether the law was clearly established.

B. Objective Reasonableness.

Having determined that the law was clearly established, this Court must now turn to the question whether Judge Zieba could reasonably have believed that his dismissal of Mumford was lawful. Judge Zieba could have reasonably believed that it was lawful to dismiss Mumford if either (a) the dismissal was not based on Mumford's political affiliation, or (b) the dismissal was based on his

political affiliation, but Judge Zieba could have reasonably believed that political affiliation was an appropriate requirement for the position of referee. The Court will first consider whether Judge Zieba could have reasonably believed that political affiliation was an appropriate requirement for the position of referee; if so, the Judge Zieba will be entitled to qualified immunity regardless of his reasons for dismissing Mumford.

As this Court noted earlier, to determine whether political affiliation is an appropriate requirement for a particular position, the Court must examine the inherent duties of the position and the duties that the new holder of the position will perform. If the tasks are political or policy-oriented, involve access to confidential and political material, or demand political loyalty, then political considerations are appropriate. Faughender, 927 F.2d at 913-14.[1]

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[1]Under this analysis, the Sixth Circuit has held that an elected official's personal staff, like a judge's bailiff or a mayor's secretary, may be discharged because of their political affiliations. Faughender, 927 F.2d 909; Balogh v. Charron, 855 F.2d 356 (6th Cir. 1988). Similarly, a city attorney, who works closely with the mayor and other elected officials, may be discharged for political reasons. Williams v. City of River Rouge, 909 F.2d 151 (6th Cir. 1990). Finally, the Sixth Circuit has held that political affiliation was an appropriate consideration in the discharge of an assistant county prosecutor who was statutorily given the "inherent policy-making responsibilities of the prosecutor." Monks v. Marlinga, 923 F.2d 423, 426 (6th Cir. 1991).

The evidence in this case shows that the referees of the Domestic Relations Court perform their work independently of the judges who refer matters to them. A referee of the Domestic Relations Court is not a personal employee of any particular judge. A referee is an employee of the Court; he or she hears matters for every judge there. In other words, a referee of the Domestic Relations Court is not the alter-ego of any single judge, but must be the alter-ego for all of the judges. Referees spend only a nominal amount of time discussing cases with the judges. Aside from the reports and recommendations they make, referees do not participate in the judges' own day-to-day decision-making process, nor do they participate in decisions about budgeting or employment or other court policy issues. Referees have their own offices, and do not have access to the judges' confidential documents or communications.

Given the scope and independence of the referees' duties to the Court as a whole, their lack of participation in decisions concerning Court policy, and their lack of access to confidential material and communications, Judge Zieba could not have reasonably believed that political affiliation was an appropriate consideration in the employment of a referee of the Domestic Relations Court.[2]

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[2]The result in this case probably would have differed if each referee was assigned to work with a single judge. In such a case, the referee's position would be similar to the position of the personal staff members at issue in Balogh

Since Judge Zieba could not have reasonably believed that political affiliation was an appropriate requirement for the position of referee, this Court must next examine Judge Zieba's reasons for dismissing Mumford. If political affiliation was a substantial or motivating factor in the dismissal, then a reasonable official could not have believed that the dismissal was lawful. Conklin v. Lovely, 834 F.2d 543, 546 (6th Cir. 1987). However, if other reasons motivated the dismissal, then a reasonable official could have believed that the dismissal was proper.

There is conflicting evidence as to whether political affiliation was a substantial or motivating factor behind Judge Zieba's dismissal of Mumford. Therefore, the Court cannot determine whether Judge Zieba's dismissal of Mumford was objectively reasonable under the circumstances. See Poe v. Haydon, 853 F.2d 418, 426 (6th Cir. 1988). Material issues of fact thus preclude summary judgment for either Mumford or Judge Zieba on the question of qualified immunity.

III. CONSTITUTIONALITY OF PATRONAGE DISMISSAL OF REFEREE

As this Court noted above, political affiliation is not an appropriate consideration in the employment of a referee of the Domestic Relations Court. However, there is

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and Faughender, whose close working relationship with an elected official required confidentiality and political loyalty.

conflicting evidence as to whether political considerations were a substantial or motivating factor in Judge Zieba's dismissal of Mumford. This material issues of fact precludes summary judgment for either Mumford or the defendants on the merits of plaintiff's claims.

Furthermore, in order to prove his § 1983 claim against a governmental entity like the Domestic Relations Court, Mumford must demonstrate that the alleged violation of his constitutional rights was caused by a policy or custom of the Court. Monell v. New York City Dept. of Social Services, 436 U.S. 658, 694-95 (1978). To succeed on his § 1983 claim against Judge Zieba, Mumford must show that Judge Zieba acted under color of state law. Neither party addressed these issues in their motions for summary judgment. These genuine issues of material fact likewise preclude summary judgment for either party.

IV. CONCLUSION

The Court finds that material issues of fact preclude summary judgment for either Mumford or Judge Zieba on the question of qualified immunity. Genuine issues of material fact also preclude summary judgment for either plaintiff or defendants on the merits of plaintiff's claims against the Domestic Relations Court and Judge Zieba. For these reasons, the Court overrules both plaintiff's and defendants' motions for summary judgment. This case will proceed to trial on plaintiff's claims for damages and declaratory and injunctive relief against both defendants.

/s/ Alvin I. Krezler
United States Senior District Judge

Dennis Niermann
Edward Kramer
M. Robert Flanagan
Pamela Theodotou

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MEMORANDUM OF OPINION AND ORDER; JUDGMENT

Case No. 1:90 CV 2243
Filed September 28, 1995

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID M. MUMFORD, *Plaintiffs*, VS. JOSEPH C. ZIEBA, et al. *Defendants.*	)	Case No. 1:90-CV-2243 JUDGE: PETER C. ECONOMUS MEMORANDUM OF OPINION AND ORDER

This matter is before the Court on a motion by Defendants to dismiss Plaintiff's complaint. Plaintiff, David M. Mumford ("Mumford"), filed this action against Judge Joseph C. Zieba ("Judge Zieba") and the Lorain County Common Pleas Court, Domestic Relations Division ("County") under 42 U.S.C. §1983 in which he alleges violations of the first and fourteenth amendments of the Constitution.

For the reasons set forth below, the Court finds that the allegations against Defendants are moot. Pursuant to Fed. R. Civ. P. 12(h)(3), the Court hereby dismisses Plaintiff's complaint.

I. FACTS

Mumford served as a referee for the Domestic Relations Court from January 22, 1979 through January 3, 1989. Mumford was a registered democrat.

In 1988, Judge Zieba ran for Domestic Relations Judge against the incumbent, Judge Henry T. Webber. During this election, Mumford actively campaigned for Judge Webber. Judge Zieba defeated Judge Webber and took office on January 3, 1989.

On that same day, Judge Zieba terminated Mumford as well as several other employees. Mumford claims that the reason for his termination was his political activity in support of Judge Webber. Mumford asserts that such political motivations were an improper basis for his termination and were in violation of his first and fourteenth amendment rights. Mumford filed this action seeking reinstatement, back pay, declaratory and injunctive relief.

This case was before the Sixth Circuit Court of Appeals on the issue of whether Judge Zieba was entitled to qualified immunity. The Court extended such immunity to Judge Zieba upon a finding that the firing of a court referee was a discretionary function based upon a reasonable interpretation by Judge Zieba of the law at that time. Mumford v. Zieba, 4 F.3d 429, 435 (6th Cir. 1993). Further, the Court dismissed the claims against the Lorain County Common Pleas Court, Domestic Relations Division because a state court is not a "person" under 42 U.S.C. §1983.

The Court ordered:

> "the case REMANDED to the district court for adjudication of the plaintiff's claim for injunctive and declaratory relief against Judge Zieba in his official capacity as Judge of the Lorain County Common Pleas Court. Moreover, plaintiffs claims against Judge Zieba in his individual capacity and against the Lorain County Common Pleas Court are hereby DISMISSED."

Id. Thus, the only remaining claims are against Judge Zieba in his official capacity.

Since the Court of Appeals decision, Judge Zieba has retired from the bench. Judge David A. Basinski ("Judge Basinski"), the Administrative Judge for the Lorain County Domestic Relations Court, was substituted for Judge Zieba as the sole defendant on February 9, 1995.

Judge Basinski filed a Motion to Dismiss arguing that Mumford's claims are moot as Judge Zieba is no longer a Domestic Relations Judge nor a party to this action. Mumford opposes this motion and urges the Court to find that Judge Basinski was properly substituted for Judge Zieba.

II. Law

Article III of the Constitution empowers the Court to hear true "cases and controversies." U.S. Const. art. III. Article III prohibits the Court from entertaining cases or issues which are moot. Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d §3533.

"The central question of all mootness problems is whether changes in circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief." Id. The critical changes in circumstances in the case at bar are Judge Zieba's retirement from the bench and the substitution of Judge Basinski for Judge Zieba as a party to this action. Thus, the issue is whether there are any remedies which are still available to Mumford against Judge Basinski.

A. Prospective/Injunctive Relief

The Supreme Court has held that even where there may have been prior discrimination by an office holder, "the issuance of prospective coercive relief against the successor to the office must rest, at a minimum, on supplemental findings of facts indicating that the new officer will continue the practices of his predecessor." Mayor of the City of Philadelphia v. Educational Equality League, et al., 415 U.S. 605, 622 (1974). The Court agrees with Judge Basinski that there is nothing in the record which would indicate that he has or will continue Judge Zieba's hiring and firing practices of referees.

Plaintiff argues that Judge Basinski's deposition testimony indicated that he has been following Judge Zieba's policies. The Court finds that Judge Basinski's testimony is inconclusive on this issue. At a minimum, there are no supplemental findings which are sufficient to hold Judge Basinski liable for Judge Zieba's conduct.

Therefore, the Court finds that Mumford's claims for prospective relief such as an injunction or a declaratory judgment are moot.

B. Backpay and Attorneys Fees

Mumford is also seeking backpay and attorneys fees against Judge Basinski in his official capacity. Such relief is really aimed at the County because the County is the true entity which will pay for this type of award. Monell v. Department of Social Services, 436 U.S. 658, 690 n.55 (1978) ("official-capacity suits generally only represent another was of pleading an action against an entity of which an officer is an agent...."). As Mumford acknowledges in his Response to this Motion, "Lorain County is the true remaining defendant...." (Response at p. 6.)

As discussed in Section I, the Court of Appeals has already dismissed the County as a defendant in this case. Mumford v. Zieba, 4 F.3d 429, 435 (6th Cir. 1993). Therefore, the Court dismisses Mumford's request for backpay and attorneys fees as moot. To hold otherwise would negate the ruling of the Court of Appeals.

III. Conclusion

The Court finds that the changed circumstances in this case, specifically the substitution of Judge Basinski for Judge Zieba who is no longer on the bench, have rendered Mumford's claims moot. Under Article III of the Constitution, the Court does not have jurisdiction to hear this case.

Pursuant to Fed. R. Civ. P. 12(h)(3), the Court must grant Defendant's Motion to Dismiss (Dkt. #128).

IT IS SO ORDERED.

Dated September 28, 1995

/s/ Peter C. Economus
PETER C. ECONOMUS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID M. MUMFORD, *Plaintiffs*,	)	Case No. 1:90-CV-2243
	)	JUDGE:
VS.	)	PETER C. ECONOMUS
	)	
JOSEPH C. ZIEBA, et al. *Defendants.*	)	JUDGMENT

This matter is before the Court upon a motion by Defendants to dismiss. For the reasons set forth in the attached Memorandum Opinion and Order which is incorporated herein by reference, the Court finds that Plaintiffs remaining claims are moot. Therefore, this Court does not have jurisdiction to hear this case.

Defendants' Motion to Dismiss (Dkt. #128) is **GRANTED**. Plaintiffs complaint is **DISMISSED.**

IT IS SO ORDERED.

Dated: September 28, 1995

/s/ Peter C. Economus
PETER C. ECONOMUS
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OPINION

Sixth Circuit Case №. 92-3430
Filed September 1, 1993

No. 92-3430

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

David M. Mumford, *Plaintiff-Appellee,*	)
v.	) ON APPEAL from the
Joseph Zieba, Judge, in his official and individual capacities; Lorain County Common Please Court, Domestic Relations Division, *Defendants-Appellants.*	) United States District) Court for the Northern) District of Ohio

Decided and filed September 1, 1993

Before: NORRIS and SILER, Circuit Judge; and KRUPANSKY, Senior Circuit Judge.

KRUPANSKY, Senior Circuit Judge. Plaintiff-appellee, David Mumford (Mumford-plaintiff) filed a 42 U.S.C. § 1983 action against the defendants, Judge Joseph Zieba (Zieba-defendant) and the Lorain County Common Please Court, Domestic Relations Division (Domestic Relations Court) charging that the defendants violated his First and Fourteenth Amendment rights by not reappointing

him to the position of chief referee of the Domestic Relations Court. The district court denied summary judgment for Judge Zieba concluding that material issues of fact existed concerning Judge Zieba's immunity from suit. The defendants filed the instant interlocutory appeal challenging the district court's denial of their motion for summary judgment on the issue of qualified immunity.

Plaintiff served as a referee[1] in the Domestic

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[1]Pursuant to Ohio Rules of Civil Procedure 53 and 75, the court may appoint one or more referees to hear an issue or issues in any case in which the parties are not entitled to a trial by jury or in any case in which the parties consent in writing or in the record in open court, to submit an issue or issues to a court-appointed referee. A referee in the Domestic Relations Division of the Common Pleas Court is an agent and officer of the appointing court and is clothed with the powers and duties of the judicial office which appoints him. *Strietelmeier v. Angelo*, 66 Ohio L. Abs. 312, 113 N.E. 2d 777, 779 (Ct. App. Muskingum Cty. 1952); *Mennel Milling Co. v. Slosser*, 140 Ohio St. 445 (1942); 47 O. Jur. 2d REFERENCES 84 § 2. Moreover, a referee is appointed at the discretion of the court and serves at the pleasure of the appointing authority. *Eudela v. Ohio Dept. of Mental Health & Mental Retardation*, 30 Oh. App. 3d 113, 506 N.E. 2d 947 (Franklin Cty. 1986); Ohio Rev. Code Ann. § 2151.13 (Anderson 1990); Oh R. Civ. P. 53. An employee who serves at the pleasure of an appointing authority can be dismissed from his position without cause absent any discrimination or malfeasance. *Eudela*, 30 O. App. 3d at 113, 506 N.E. 2d at 947.

Relations Court from 1984 to January 2, 1989.[2] In 1988, Mumford, a registered Democrat, assisted in the campaign to re-elect Democratic incumbent Judge Henry T. Webber (Webber), who ran against the Republican defendant Zieba in a non-partisan election for judge of the Domestic Relations Court. During the campaign, Judge Zieba advised Mumford, "don't get caught in the cross-fire." Subsequently, Zieba observed Mumford distributing campaign literature for Judge Webber in early November of 1988. Judge Zieba defeated Judge Webber in the November, 1988 election as Domestic Relations Court judge. His six-year term commenced on January 3, 1989. Beginning January 4, 1989, a second judge for the Domestic Relations Court began serving a six-year term. Oh. Rev. Code Ann. § 2301.02(C).[3]

On December 22, 1988, Judge Zieba notified Mumford by letter that his position as referee would terminate on January 3, 1989, when Judge Zieba assumed his

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[2]Prior to 1984, plaintiff was a juvenile court referee for five years. In Lorain County, the Juvenile Court is within the division of the Domestic Relations Court. Ohio Rev. Code §§ 2301.03(c) and 2301.07.

[3]Prior to January 4, 1989, the Domestic Relations Court had only one judge hearing domestic and juvenile matters.

office. Judge Zieba subsequently appointed two part-time referees, both Republicans, to hear domestic matters.[4]

On December 17, 1990, plaintiff initiated this action under 42 U.S.C. § 1983 against defendant Zieba in his individual and official capacities and against the Domestic Relations Court seeking monetary damages, as well as injunctive and declaratory relief.[5] Mumford charged that the defendants violated his First and Fourteenth Amendment rights by refusing to reappoint him to the position of chief referee of the Domestic Relations Court on January 3, 1989.

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[4]In addition to the two part-time referees appointed to hear domestic matters, Judge Zieba appointed three other referees to hear juvenile matters.

[5]In order to assert a section 1983 claim, a plaintiff must prove that he was deprived of a right secured by the Constitution or the laws of the United States and that the deprivation was caused by a person while acting under the color of state law. *Flagg Bros. v. Brooks*, 436 U.S. 149, 155-57, 98 S. Ct. 1729 (1978). A plaintiff asserting patronage dismissal must prove that he is entitled to First Amendment protection and that the discharge was causally related to plaintiff's political activities. *Faughender v. North Olmsted*, 927 F.2d 909, 913 (6th Cir. 1991); *Conklin v. Lovely*, 834 F.2d 543, 546 (6th Cir. 1987). The Supreme Court has left to subsequent courts to determine, on a case-by-case basis, if an individual is entitled to First Amendment protection, i.e., whether political affiliation is an appropriate requirement for the effective performance of a public office. *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287 (1980); *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673 (1976); *Williams v. River Rouge*, 909 F.2d 151 (6th Cir. 1990).

Specifically, plaintiff asserted that he was not reappointed by Judge Zieba because he supported Zieba's opponent, Judge Webber, during the judicial election campaign.

On August 30, 1990, the defendants filed a motion for summary judgment arguing that Mumford was not entitled to First and Fourteenth Amendment protection from patronage dismissal because political affiliation was an appropriate requirement for his position as chief referee. Moreover, Judge Zieba argued that he was protected immunity because the law was not clearly established on January 3, 1989 that a chief referee of a domestic relations court could not be discharged for reasons anchored in political patronage.

In January 28, 1991, defendant Domestic Relations Court filed a separate motion to dismiss asserting that the Lorain County Common Pleas Court was not a legal entity which may be sued under § 1983. The district court denied the motion to dismiss in a marginal order dated May 10, 1991.

Plaintiff filed a cross-motion for summary judgment on August 30, 1991, charging that the evidence proved that he was discharged because of his political affiliations and that he was entitled to First and Fourteenth Amendment protection as a matter of law. Subsequently, both parties filed memoranda in opposition to the opposing motions for

summary judgment, and the defendants then filed a reply brief support of their motion for summary judgment.

In its memorandum opinion filed March 31, 1992, the district court concluded that material issues of fact precluded summary judgment in favor of Judge Zieba on the issue of qualified immunity. The court first determined that the law was clearly established in 1989 that the position of court referee was protected by the First Amendment pursuant to the dictates of *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287 (1980) and *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673 (1976). It further concluded that the question of political affiliation as a requirement for the effective performance of a particular position was an issue of fact, not law, which "relates to the objective reasonableness of Judge Zieba's dismissal of Mumford, and not to the question whether the law was clearly established." After examining the inherent duties of the position of a referee and the duties the incumbent performed, the court concluded that political party affiliation was not an appropriate requisite for serving as a Domestic Relations Court referee. It observed that the position of referee did not enjoy the policymaking or confidential status of a judge's bailiff, law clerk or private secretary.[6] It further

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[6]However, the court noted that the result probably would have differed if each referee was assigned to work with a single judge. In such a case, the referee's position would be similar to the position of the personal staff members at issue in *Balogh* and *Faughender*, whose

determined that, in light of existing legal precedent, Judge Zieba could not have reasonably believed that political affiliation was an appropriate requirement for the office of referee of the Domestic Relations Court. Moreover, the court concluded that conflicting evidence existed concerning Zieba's political motivation for refusing to reappoint Mumford to his previous duties. Accordingly, the court decided that "material issues of fact precluded summary judgment for Judge Zieba on the issue of qualified immunity."[7]

It is undisputed that a judicial officer performing administrative acts, like any governmental official, may assert the defense of qualified immunity. *Forrester v. White*, 484 U.S. 219, 108 S. Ct. 538 (1988). Governmental officials who perform discretionary functions generally are shielded from personal liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights known to a reasonable person. *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727 (1982). "Using a fact-specific approach, the standard to be applied in resolving the 'clearly established law' predicate within the *Harlow* touchstone of 'objective reasonableness'

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close working relationships with an elected official required confidentiality and political loyalty.

[7]In addition, the district court concluded that material issues of fact precluded summary judgement on the merits of plaintiff's section 1983 claim.

is defined in *Malley v. Briggs*, 475 U.S. 335, 341, 89 L. Ed. 2d 271, 106 S. Ct. 1092 (1986): 'if officers of reasonable competence could disagree on this issue, immunity should be recognized.'" *Cagle v. Gilley*, 957 F.2d 1347, 1348 (6th Cir. 1992).

Thus, the issue of confrontation in this appellate review is not whether Judge Zieba actually violated Mumford's First and Fourteenth rights -- an issue of fact implicating the merits of plaintiff's claim and reserved for the trier of fact. Rather, the issue is whether plaintiff's rights were so clearly apparent when he was terminated that Judge Zieba should have understood that his conduct at the time he refused to reappoint the plaintiff as a chief referee of the Domestic Relations Court violated Mumford's First and Fourteenth Amendment rights -- a purely legal question for the trial judge to determine prior to trial.[8] *Anderson v.*

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[8]The district court in the instant action incorrectly confused factual issues implicating the merits of plaintiff's substantive claim with the legal issue of qualified immunity. The district court rejected Judge Zieba's argument that he should be immune from suit for damages arising from an alleged politically motivated decision not to reappoint Mumford as a chief referee in the Domestic Relations Court. It determined that the law was clearly established that Zieba's decision violated Mumford's First Amendment rights under the holdings of *Elrod* and *Branti*. The district court then mischaracterized as a factual determination the legal question of whether the defendant should have known that his alleged acts violated clearly established rights existing at the time. Rather than directing its attention to legal precedent in this

Creighton, 483 U.S. 635, 107 S. Ct. 3034 (1987); *Guercio v. Brody*, 911 F.2d 1179, 1183 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 1681 (1991); *Garvie v. Jackson*, 845 F.2d 647, 649 (6th Cir. 1988); *Ramirez v. Webb*, 835 F.2d 1153, 1156 (6th Cir. 1987).

In this circuit, a finding of a clearly established constitutional right must generally be supported by precedent from the Supreme Court or this circuit, or in the alternative, by decisions from other circuits. *Ohio Civil Serv. Employees Ass'n v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988). "Although decisions of other courts can clearly establish the law, such decisions must both point unmistakenly to the unconstitutionality of the conduct and be so clearly foreshadowed by applicable direct authority as

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and other circuits, the district court evaluated the inherent duties of a referee concluding that there was no genuine issue of fact that a referee was not a policymaking or confidential employee and thus entitled to First Amendment protection -- a conclusion which addresses the merits of plaintiff's claim rather than the issue of qualified immunity. *See Faughender v. North Olmsted, Ohio*, 927 F.2d 909, 913-14 (6th Cir. 1991)(court must examine the inherent duties of the position and the duties of the new incumbent to determine whether political affiliation is an appropriate consideration for appointment to a particular vacancy). It further concluded that summary judgement on the issue of qualified immunity was precluded because there was an issue of fact as to whether political affiliation was a substantial or motivating factor in Judge Zieba's dismissal of Mumford -- again a factual issue implicating the merits of plaintiff's claim.

to leave no doubt in the mind of a reasonable officer that his conduct was unconstitutional." *Cagle*, 957 F.2d at 1328.

In the instant action, the plaintiff and trial court relied solely on the Supreme Court decisions of *Elrod* and *Branti* to sustain their position that existing precedent clearly established that a chief referee in a domestic relations court could not be denied reappointment to a vacant office for political reasons. Judge Zieba responded by asserting that at the time of Mumford's dismissal in early 1989, the law had not developed to notify a person of reasonable competence confronting similar circumstances that Judge Zieba's actions violated the First and Fourteenth Amendment rights of a person similarly situated to the plaintiff. Consequently, Judge Zieba urged that he was entitled to qualified immunity because he acted in an objectively reasonable manner. This court agrees that in January 1989, First Amendment law had not clearly established that a domestic relations court judge could not refuse to reappoint a chief referee for politically motivated reasons.

In early 1989, the relevant case law concerning politically motivated personnel decisions included *Branti*, 445 U.S. at 507, 100 S. Ct. at 1287; *Elrod*, 427 U.S. at 347, 96 S. Ct at 2673; and *Balogh v. Charron*, 855 F.2d 356 (6th Cir. 1988). In summary, the Supreme Court directed that political patronage practices, including politically motivated discharges, were generally

unconstitutional because they infringed on the protected speech and associational rights of government employees. *Elrod*, 427 U.S. at 358-60, 96 S. Ct. at 2682-83. However, the Court reasoned that an employee's First Amendment rights could be outweighed by the need to maintain governmental effectiveness and efficiency when the employee's private political beliefs would interfere with the discharge of his public duties. *Branti*, 445 U.S. at 517, 100 S. Ct. at 1294. Thus, a governmental employee could be discharged because of his political affiliation if political affiliation was an appropriate requirement for the effective performance of the public office involved.[9] *Id.* at 515, 100 S. Ct. at 1293; *Elrod*, 427 U.S. at 372-75, 96 S. Ct. at 2689-90. A failure to reappoint an individual to a position subject to at-will discharge for any reason is equally impermissible if reappointment was denied because of the individual's exercise of First Amendment rights. *Branti*, 445 U.S. at 515, 100 S. Ct. at 1293. Thus, failure to rehire a government employee constitutes a discharge even though, in form, the term of the appointment had expired. *Id.*

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[9]When analyzing whether political beliefs are an appropriate requirement for the position, a court considers the inherent duties of that position and duties that the new holder of that position will perform. *Faughender v. North Olmsted*, 927 F.2d 909, 913 (6th Cir. 1991). As noted in *Williams v. River Rouge*, 909 F.2d 151, 153 n. 4 (6th Cir. 1990), political affiliation also can mean commonality of political purpose and support, not solely political party membership. *See Balogh v. Charron*, 855 F.2d 356 (6th Cir. 1988).

In *Elrod*, plaintiffs, all Republicans, were employees of the Cook County Sheriff's Office. *Elrod*, 427 U.S. at 350, 96 S. Ct. at 2678. The newly elected Democratic Sheriff discharged the plaintiffs solely because they did not support and were not members of the Democratic Party and had failed to receive the endorsement of its leaders. *Id.* at 351, 96 S. Ct. at 2679. In determining that the plaintiffs were terminated in violation of their First Amendment rights, a plurality of the Court in *Elrod* concluded that "a nonpolicymaking, nonconfidential government employee can[not] be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs." *Id.* at 375, 96 S. Ct. at 2690. The plurality noted that the government had a vital interest in ensuring that "representative government not be undercut by tactics obstructing the implementation of policies of the new administration." *Id.* at 367, 96 S. Ct. at 2687. Accordingly, confidential employees in policymaking positions could be dismissed for political reasons. *Id.* at 372, 96 S. Ct. at 2689.

In affirming *Elrod*, the Court in *Branti* clarified the standard to be applied by government officials exercising personnel decisions. The Court noted that "it is not always easy to determine whether a position is one in which political affiliation is a legitimate factor to be considered. Under some circumstances, a position may be appropriately considered political even though it is neither confidential nor policymaking in character." *Branti*, 445 U.S. at 518,

100 S. Ct. at 1294. Thus, the Court abandoned the labels of "policymaker" and "confidential employee," and stated that the relevant issue was "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* at 518, 100 S. Ct. at 1295. Addressing the merits of plaintiff's claim, the Court concluded that the continued employment of a public defender could not properly be conditioned upon his allegiance to the political party in control of the county government. *Id.* Noting that the primary responsibility of the assistant public defender was to represent individual citizens in controversy with the State, the Court determined that "it would undermine, rather than promote, the effective performance of an assistant public defender's officer to make his tenure dependent on his allegiance to the dominant political party." *Id.* at 519-20, 100 S. Ct. at 1295.

At the time of Mumford's discharge in January of 1989, the Sixth Circuit's contribution to this area of the law included *Balogh v. Charron*, 855 F.2d 356 (6th Cir. 1988). In *Balogh*, this circuit concluded that a court bailiff could be discharged without violating the First Amendment because he was a confidential employee of the judge by whom he was employed. *Id.* The court emphasized that as a judicial aide the bailiff was privy to sensitive communications, acted as the judge's bodyguard, and was aware of case dispositions prior to the publication of decisions. *Id.* The test of confidential employment

> does not depend on the subjective view of the employee concerning the trust the judge reposes in him, nor does it depend on the need for intimacy or trust. It depends on the function of the job.

Id. Thus, in a *Balogh* climate where a confidential nonpolicymaking employee works in a close relationship with the elected official, friction and animosities arising from political opposition may occur that create untenable job situations resulting in efficient operation of the system.

The Second Circuit, in *Hawkins v. Steingut*, 829 F.2d 318 (2d Cir. 1987), granted state officials qualified immunity when they refused to reappoint a plaintiff to the position of workers' compensation referee because federal law was not clearly established that prohibitions against political patronage dismissals extended to administrative law positions at the time reappointment was denied the plaintiff. The duty of a worker's compensation referee, which parallels that of a domestic relations court referee, included hearing and determining claims, conducting hearings and investigations, and issuing orders, decisions and determinations as required by the workers' compensation board. *Id.* at 318. Finding that *Elrod* and *Branti* developed a useful framework for assessing the constitutionality of patronage dismissals, the Second Circuit noted that courts have proceeded on a case-by-case basis to enumerate the permissible and impermissible instances of politically motivated employment decisions. *Id.* at 320.

"'[I]dentifying generic categories of positions where partisan selection and rejection are permissible has...proven to be an elusive and intractable task.'" *Id.* (quoting *Jimerez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 241 (1st Cir. 1986)(en banc), *cert. denied*, 107 S. Ct. 1888 (1987)).

This circuit, in *Cagle v. Gilley*, 957 F.2d 1347, 1349 (6th Cir. 1992), adopted a similar approach applied by the Second Circuit in *Hawkins* when deciding the issue of qualified immunity in political patronage cases. Plaintiffs in *Cagle* charged that the defendant, the Sheriff of Bradley County, Tennessee, violated their First Amendment rights by not rehiring them as deputies. Specifically, they alleged that they were not reappointed by the newly elected Sheriff because they supported his opponent during the election campaign for the office of Sheriff of Bradley County. *Cagle*, 957 F.2d at 1348. This circuit determined that reliance on the dictates of *Branti* and *Elrod* alone were insufficient to prove that the law was clearly established in 1988 that a Sheriff would have clearly understood that he was under an affirmative duty to have refrained from refusing to reappoint the plaintiffs to the positions of deputy. *Cagle*, 957 F.2d at 1349. Concluding that the Sheriff was protected by the doctrine of qualified immunity, this circuit noted that the parties had not directed the court's attention to a single Supreme Court or Sixth Circuit decision that existed prior to August or September, 1988, wherein political affiliation was considered to be an unconstitutional or legally invalid reason for refusing a

reappointment to the position of deputy sheriff upon application of *Elrod* and *Branti* principles. *Id.* It further determined that the law of the district court and other circuits remained unsettled on the question. *Id.* Accordingly, this circuit concluded that those rights were not clearly established in August and September, 1988 when the deputies were not reappointed by Gilley. *Id.*

As in *Cagle*, the plaintiff and the trial court in the instant action failed to direct this court's attention to a single case in this circuit or any other circuit which clearly established that political affiliation was not a proper job requirement for a chief referee of a domestic relations court. Moreover, this court is mindful of its decision in *Balogh* wherein it concluded that a confidential nonpolicymaking court bailiff did not enjoy the right to be free from patronage dismissals, which disposition supports Judge Zieba's position that he should accorded qualified immunity under the circumstances of this case. A competent judge in the position of Judge Zieba could have reasonably concluded that the position of chief referee was a confidential position and thus not entitled to First Amendment protection. In addition, this circuit in recent years has noted that a wide number of public officials do not enjoy the right to be free from patronage dismissal. *See e.g., Monks v. Marlinga*, 923 F.2d 423 (6th Cir. 1991)(assistant prosecutor); *Williams v. City of River Rouge*, 909 F.2d 151 (6th Cir. 1990)(city attorney); and *Christian v. Belcher*, 888 F.2d 410, 415 (6th Cir. 1989)(county flood

plain administrator). Accordingly, it cannot be said that any judge of reasonable competence in Zieba's position, measured objectively, would have clearly understood that he was under an affirmative duty to have refrained from refusing to reappoint Mumford in January of 1989 to the position of chief referee. Thus, Judge Zieba is entitled to the protection of qualified immunity.

Sixth Circuit precedent dictates that the defense of qualified immunity protects officials only from suit for monetary damages. *Hensley v. Wilson*, 850 F.2d 269, 273 (6th Cir. 1988). "An official is not entitled to immunity from actions seeking only injunctive and declaratory relief." *Davis v. Scherer*, 104 S. Ct. 3012 (1984); *Spruytte v. Walters*, 753 F.2d 498 (6th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986). Thus, the granting of qualified immunity does not effect the merits of Mumford's claim.

Finally, although plaintiff argued that this court's jurisdiction is limited to the qualified immunity issue, it is clear that this circuit may consider other issues as well. *Foster v. Walsh*, 864 F.2d 416, 418 (6th Cir. 1988)(per curiam). Because this court has held that a state court is not a "person" within the meaning of that term as used in § 1983, plaintiff's claim against the Lorain County Common Please Court must be dismissed. *Id.*

Accordingly, after reviewing the record in its entirety and the arguments of counsel, the disposition of the

district court concerning Judge Zieba's entitlement to qualified immunity is hereby **REVERSED** and the case **REMANDED** to the district court for adjudication of the plaintiff's claim for injunctive and declaratory relief against Judge Zieba in his official capacity as Judge of the Lorain County Common Please Court. Moreover, plaintiff's claims against Judge Zieba in his individual capacity and against the Lorain County Common Please Court are hereby **DISMISSED**.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JUDGMENT

Sixth Circuit Case Nº. 92-3430
Filed October 8, 1993

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nº 92-3430

DAVID M. MUMFORD,
Plaintiffs,

v.

JOSEPH C. ZIEBA, et al.
Defendants.

Before: Norris and Siler, Circuit Judges; and
Krupansky, Senior Circuit Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Northern District of Ohio at Cleveland.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district concerning Judge Zieba's entitlement to qualified immunity is REVERSED and the case is REMANDED for adjudication of the plaintiff's claim for injunctive and declaratory relief against Judge Zieba in his official capacity as Judge of the Lorain County Common Pleas Court. IT IS FURTHER ORDERED that the plaintiff's claims

against Judge Zieba in his individual capacity and against the Lorain County Common Pleas Court are DISMISSED.

ENTERED BY ORDER OF THE COURT

_____

/s/ Leonard Green, Clerk

Issued as Mandate: October 8, 1993 A True Copy.

COSTS: None Attest:

Filing Fee.....$
Printing.....$

_____

/s/Deputy Clerk

Total.....$

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MOTION TO STRIKE APPELLANTS' ARGUMENTS AND RECORD DESIGNATIONS THAT FALL BEYOND THE SCOPE OF THE INSTANT APPEAL

Sixth Circuit Case №. 95-4127
Filed February 14, 1996

UNITED STATES COURT OF APPEAL
for the Sixth Circuit

DAVID M. MUMFORD
Plaintiff-Appellant

v.

JOSEPH ZIEBA, In his official and individual capacities as Judge of the Lorain County Common Pleas Court, Domestic Relations Division; LORAIN COUNTY COMMON PLEAS COURT, DOMESTIC RELATIONS DIVISION; DAVID A BASINSKI, Judge, Domestic Relations Court
Defendants-Appellees

CASE NO. 95-4127

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

(District Court No. 90-02243)

MOTION TO STRIKE APPELLANTS' ARGUMENTS AND RECORD DESIGNATIONS THAT FALL BEYOND THE SCOPE OF THE INSTANT APPEAL

Appellant David Mumford moves the Court, through undersigned counsel, to Strike Appellants' Arguments and Record Designations that fall beyond the scope of the instant appeal.

This case was dismissed as moot by the district court on the grounds that Mr. Mumford's claims were moot due to the substitution of one Administrative Judge for another Administrative Judge. [See attached Memorandum Opinion and Order dated September 28, 1995.] This is the decision that was appealed. No cross-appeal was filed by the Defendants-Appellees.

Now, Defendants-Appellees, without having filed their own appeal or a cross appeal, are seeking a complete *de novo* review of issues that have been decided by not only the district court but by this court in an earlier opinion. Defendants-Appellees make this request at pages 27 through 36 of their brief, which is attached for this court's easy reference.

The non-appealing Defendants-Appellee's improperly attempt to raise the already decided issue as to whether the First Amendment prohibits the patronage dismissal of a referee employed by a county court. This was already decided in an opinion rendered by the District Court in *Mumford v. Zieba*, 788 F. Supp. 987, 992 (N.D., Ohio, 1992) where the court found that

> [i]f political affiliation was a substantial or motivating factor in the dismissal, then a reasonable official could not have believed that the dismissal was lawful. *Conklin v. Lovely*, 834 F.2d 543, 546 (6th Cir., 1987) [Emphasis added.]

This finding was not overturned by this Court's 1993 decision, which only reversed the denial of "qualified immunity" by the 1992 District Court opinion. The District Court at 788 F. Supp. 987, 992 (N.D., Ohio, 1992), ended its discussion of qualified immunity in § II. of its opinion, and began its next section as follows:

> III. CONSTITUTIONALITY OF PATRONAGE DISMISSAL OF REFEREE
>
> As this court noted above, political affiliation is not an appropriate consideration in the employment of a referee of the Domestic Relations Court. However, there is conflicting evidence as to whether political considerations were a substantial or motivating factor in Judge Zieba's dismissal of Mumford. This [sic] material issues of fact precludes summary judgment for either Mumford or the defendants on the merits of plaintiff's claims. [Emphasis added.]

This finding was not upset by this court, which ruled in *Mumford v. Zieba* 4 F.3d 429, 435 (1993) that "...the granting of qualified immunity does not effect the merits of Mumford's claims." [Emphasis added.] Since this Court of Appeals specifically ruled that its 1993 decision did not upset the District Court's 1992 ruling on the merits, the "issue" the non-appealing Defendants-Appellee's improperly attempt to "raise" is not now before this court. It has already been decided and is not now under appeal. Defendants-Appellee's never appealed this finding, adverse to their interests, to the U.S. Supreme Court.

Defendants-Appellees are now improperly attempting to expand this limited "mootness" appeal into a full-blown *de novo* review of the findings of the District Court. If there is any doubt that the issue Defendants-Appellees attempt to raise now is not properly before this Court at this time, it can be resolved by a full reading of both decisions, *Mumford v. Zieba*, 788 F. Supp. 987 (N.D., Ohio, 1992) and *Mumford v. Zieba* 4 F.3d 429 (1993), which are attached for easy reference.

If this court chooses to *de novo* review the entire record in order to determine whether it agrees with the decision already made by this Court, it will be necessary to not only make such a review, but also will be necessary to modify and/or alter the ruling on the District Court's FRAP 11 (e) Motion to only transmit certain portions of a record that Defendants-Appellee's now want to totally revisit.

Also, if this Court allows this already decided issue to be reopened using the vehicle of a response to a mootness appeal, rather than their own appeal, Plaintiff-Appellant will then be put in the unfair position of having to respond to such arguments with severe page limitations to an issue that is not relevant to the appeal at hand. If this is the case, Plaintiff-Appellant will then request from this Court an expanded briefing page limitation for the Appellant's Reply Brief.

For all of the foregoing reasons, the Plaintiff-Appellant hereby respectfully requests that this Court strike pages 27 through 36 of the Defendants-Appellee's Brief and all related Joint Appendix Designations. If this Court does not grant this request, then and only then does the Plaintiff-Appellant respectfully requests an expansion of their Reply

Brief page limitation to fifty (50) pages, as well as an order modifying the District Court's FRAP 11 (e) limitation and directing the District Court to submit the entire record to this Court for its *de novo* review.

Respectfully submitted,

/s/Dennis J. Niermann, Esq. [I.D.# 007988]
Edward G. Kramer, Esq. [I.D.# 0024873]
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(216) 431-5300

APPENDIX I

OHIO ATTORNEY GENERAL OPINIONS

No. 88-055, filed 8/25/88 . . . . . I-1 - I-17

No. 8014, filed 4/9/85 . . . . . I-18 - I-33

Pages I-1 thru I-33

OFFICE OF THE ATTORNEY GENERAL OF OHIO
OPINION NO. 88-055

1988 Ohio AG LEXIS 55; 1988 Op. Atty Gen. Ohio 250
August 25, 1988

SYLLABUS:
[*1]

1. 1 common pleas court judge is a county officer for purposes of R.C. 305.14 and R.C. 309.09.

2. A common pleas court judge is an employee of the county in which he serves for purposes of R.C. 2744.07.

3. R.C. 309.09 and R.C. 305.14 do not authorize a board of county commissioners to reimburse a county officer for expenses incurred in a legal action which is no longer pending. (1980 Op. Att'y Gen. No. 80-076, syllabus, paragraph three, overruled.)

4. R.C. 2744.07(A)(1) does not authorize a political subdivision to reimburse an employee for or indemnify an employee against costs incurred in retaining private counsel in an action in which the political subdivision did not participate and the employee's request for reimbursement was not Bade until after the case was dismissed.

OPINION BY: ANTHONY J. CELEBREEZE, JR.,
Attorney General

OPINION:

The Honorable Jill R. Heck
Hedina County Prosecuting Attorney
135 South Jefferson Street
Medina, Ohio 44256

I have before me your request for my opinion regarding whether the board of county commissioners oust pay the legal fees incurred by a Medina County Common Pleas Court judge in two separate legal proceedings. The first of these proceedings was a [22] defamation action in which the judge was eased as defendant. He was found not liable. The second was a proceeding before the Ohio Supreme Court disciplinary committee. The charges against the judge were dismissed. A member of your staff has indicated that the judge did not ask you to represent him in these actions, nor did he ask you or the board of county commissioners to retain private counsel to represent his. Instead, the judge retained private counsel and now seeks reimbursement for the expenses incurred.

Your question requires construction of R.C. 309.09, R.C. 305.14, and R.C. 2744.07. R.C. 309.09 requires the county prosecutor to represent county officers, and provides in pertinent part:

(A) The prosecuting attorney shall be the legal adviser of the board of county commissioners, board of elections, and

all other county officers and boards, including all tax supported public libraries, and any of them may require written opinions or instructions from him in matters connected with their official duties. He shall prosecute and defend all suits and actions which any such officer or board directs or to which it is a party, and no county officer may employ any other counsel [*3] or attorney at the expense of the county, except as provided in section 305.14 of the Revised Code.

R.C. 305.14 describes the procedure that must be followed for a county officer to receive representation from someone other than the county prosecutor:

The court of common pleas, upon the application of the prosecuting attorney and the board of county commissioners, may authorize the board to employ legal counsel to assist the prosecuting attorney, the board, or any other county officer in any matter of public business coring before such board or officer and in the prosecution or defense of any action or proceeding in which such board or officer is a party or has an interest, in its official capacity.

The board of county commissioners may also employ legal counsel, as provided in section 309.09 of the Revised Code, to represent it in any matter of public business coming before such board, and in the prosecution or defense of any action or proceeding in which such board is a party or has an interest, in its official capacity.

R.C. 2744.07(A)(1) requires all political subdivisions to "provide for the defense" of all county employees who are sued as a result of acts or omissions [*4] that occurred while the employee was acting in good faith and within the scope of his employment:

(A)(1) Except as otherwise provided in this division, a political subdivision n1 shall provide for the defense of an employee, in any state or federal court, in any civil action or proceeding to recover damages for injury, death, or loss to persons or property allegedly caused by an act or omission of the employee in connection with a governmental or proprietary function if the act or omission occurred or is alleged to have occurred while the employee was acting in good faith and not manifestly outside the scope of his employment or official responsibilities. Amounts expended by a political subdivision in the defense of its employees shall be from funds appropriated for this purpose or from proceeds of insurance. The duty to provide for the defense of an employee specified in this division does not apply in a civil action or proceeding that is commenced by or on behalf of a political subdivision. n2 (Footnotes added.)

Thus, under R.C. 309.09 and R.C. 305.14, counties are obligated to defend certain county officers; under R.C. 2744.07, they are obligated to defend certain county [*5] employees. Accordingly, the first issue to be addressed is Whether a judge of the court of common pleas is a county

officer for purposes of R.C. 305.14 and 309.09 and whether he is a county employee for purposes of R.C. 2744.07.

n1 R.C. 2744.01(F) includes County within the definition of apolitical subdivision."

n2 R.C. 2744.07 became effective November 20, 1985. 1985 Ohio Laws 1699 (AD. Sub. B.B. 176, Off. Nov. 20, 1985). Although the actions against the judge were apparently both completed by this date, R.C. 2744.07 Day still apply. Uncodified section 4 of H.B. 176 provides in pertinent part that "[T]he provisions of section 2744.07 of the Revised Code shall be used by and inure to the benefit of a political subdivision and its employees in connection with judgments rendered prior to as well as on or after the effective date of this act . . . . "

In 1985 Op. Att'y Gen. No. 85-014, I examined the issue of whether a common pleas judge is a county officer for purposes of R.C. 309.09. In that opinion, I recognized that a common pleas judge is a state officer for certain purposes. See *Tymcio v. State*, 52 Ohio App. 2d 298, 369 N.E.2d 1063 (Franklin County 1977). [*6] However, I noted the close connection between the court of common pleas and the county which it serves and concluded that a common pleas judge is a county officer for purposes of obtaining legal representation under R.C. 309.09. R.C. 305.14 is clearly intended to allow the hiring of private counsel to represent any county officer or board otherwise entitled to

be represented by the prosecuting attorney under R.C. 309.09. Both sections refer to "county officer," and it is apparent that the term was intended to have the same meaning in both sections. Thus, I conclude that a common pleas judge is a county officer for purposes of both R.C. 309.09 and R.C. 305.14.

A slightly different analysis is necessary to determine if a common pleas judge is a county employee for purposes of R.C. 2744.07. R.C. 2744.01 defines "employee" for purposes of R.C. Chapter 2744 and provides in pertinent part:

(B) "Employee" means an officer, agent, employee, or servant, whether or not compensated or full-size or part-time, who is authorized to act and is acting within the scope of his employment for a policital subdivision. "Employee" does not include an independent contractor. "Employee" includes [*7] any elected or appointed official of a political subdivision. (Emphasis added.)

A common pleas judge is an elected official. See Ohio Const. art. IV, @ 6. The question thus becomes whether a common pleas judge is an elected official of the county. As mentioned above, a common pleas judge is considered a state officer for certain purposes. However, the same factors which support any conclusion that a common pleas judge is an officer of the county for purposes of R.C. 309.09 and R.C. 305.14 also lead he to conclude that he

may be considered an elected official of the county for purposes of R.C. 2744.01(B) and therefore an employee of the county for purposes of R.C. 2744.07. See Op. No. 85-014.

Thus, pursuant to R.C. 309.09, a county prosecutor may be required to represent a common pleas judge under certain circumstances, n3 and, pursuant to R.C. 2744.07, the county may be required to "provide a defenses for a common pleas judge under certain circumstances. n4 It must be determined, however, whether R.C. 309.09, R.C. 305.14, or R.C. 2744.07 require a county to reimburse a common pleas judge for legal expenses incurred by a judge who hired private counsel to [*8] defend him in an action in which the county was not given the opportunity to provide a defense for the judge while the case was pending.

n3 The Ohio Supreme Court has stated that "R.C. 309.09 is clear -- it is the duty of the prosecuting attorney to defend all actions to which any county officer or board is a party." State ex ref. *Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 465, 423 N.E.2d 105, 110(1981). Under R.C. 309.09 the prosecuting attorney's duty to defend a county officer arises when there is a well-intended attempt to perform an official duty on the part of the officer. See Op. No. 85-014; 1954 Op. Att'y Gen. No. 4567, p. 570.

n4 Where R.C. Chapter 2744 is applicable, the duty to defend a county employee arises if the employee's alleged

act or omission occurred while the employee was acting in good faith and not manifestly outside the scope of his employment or official responsibilities. R.C. 2744.07(A)(1).

R.C. 309.09 provides that a county officer may not employ counsel other than the prosecuting attorney "at the expense of the county except as provided in section 305.14 of the Revised Code." R.C. 305.14 provides that the court of common pleas may [*9] authorize the board of county commissions "to employ legal counsel to assist . . . any . . county officer in . . . the . . . defense of any action or proceeding in which such . . . officer is a party . . . in [his] official capacity." (Emphasis added.) My predecessor considered this language and noted that it "seems to contemplate action occurring prior to hiring of counsel." Op. No. 80-076 at 2-304. He concluded, however, that the language "does not . . . clearly preclude an application [for employment of counsel] made subsequent to the time counsel is hired." Id. See also 1980 Op. No. 80-076 (Syllabus, paragraph 3) ("R.C. 305.14 permits a court of common pleas to authorize the board of county commissioners to employ legal counsel to assist the prosecuting attorney 'upon the application of the prosecuting attorney and board of county commissioners'; it does not specifically require application to be made before counsel has been hired and work has commenced. A determination as to whether to grant such an application rests in the discretion of the courts). n5

n5 The Ohio Supreme Court identified an exception to the application requirement of R.C. 305.14 in State ex rel. *Corrigan v. Seminatore*, (syllabus, paragraph one) (application by both the prosecuting attorney and the board of county commissioners is a prerequisite to authorization by a court of common pleas pursuant to R.C. 305.14 of appointment of other counsel to represent a county officer, except where the prosecuting attorney has a conflict of interest and refuses to make applications). [*10]

I disagree with my predecessor's conclusion. R.C. 1.42 provides that "[w]ords and phrases [in the Revised Code] shall be read in contest and construed according to the rules of grammar and common usage." The language used in R.C. 305.14 indicates that a county may employ legal counsel only to assist in the defense of a county officer in a pending case. The statute provides that the county may employ counsel to represent a county officer in any action in which the officer "is a party." In addition, the statute clearly provides that the county say "employ" legal counsel; nowhere does the statute provide for the payment or reimbursement of legal counsel employed by another. The General Assembly can be presumed to have chosen its words advisedly. R.C. 309.09 and R.C. 305.14 use the word "employ." Webster's New World Dictionary 459 (2d college ed. 1972) defines "employ" as "to engage the services or labor of for pay; hire . . . ." See also Black's Law Dictionary 471 (5th ed. 1979) (defining "employ" as "[t]o engage one's service; to hire . . . ."). The word

"employ" suggests present or prospective action. In contrast, the tern "reimburse" has a different meaning. [*11] The common dictionary definition of the term is to "pay back (money spent) . . . to repay or compensate (a person) for expenses, damages, losses, etc." Webster's New World Dictionary at 1197. The law dictionary has a similar definition for the term. See Black's Law Dictionary at 1157 (n[t]o pay back, to make restoration, to repay that expended"). Based upon the foregoing definitions it is clear that the judge does not seek to have the county employ counsel, but instead seeks that the county reimburse hi' for the legal fees he has already expended. In Op. No. 80-076 My predecessor simply equated reimbursement with employment without further analysis. I note, however, that the General Assembly has often used the words "reimburse" or "reimbursement" to express its intention that moneys previously advanced may be repaid. R.C. Title 3 is rife with examples. See, e.g., R.C. 311.07(B) (requiring a county receiving emergency aid from another political subdivision to (reimburse the political subdivision furnishing it the cost of furnishing such aid. . . .") (emphasis added); R.C. 311.29(D) (allowing the county sheriff to enter contracts with other political [ill] subdivisions to provide police services and requiring that "[c]ontracts entered into . . . shall provide for the reimbursement of the county for costs incurred by the sheriff. . . .n) (emphasis added); R.C. 324.05 (requiring utilities supplying service subject to tax under R.C. 324.02 to file a return reflecting taxes collected, less a percentage

of the tax collected "which amount shall be retained by the utility as reimbursement for its expenses of billing and collecting the taxi) (emphasis added); R.C. 351.04(C) (establishing the board of directors of a convention facilities authority and providing that "[e]ach director shall be entitled to receive from the authority reimbursement for reasonable expenses in the performance of his duties") (emphasis added). In light of the repeated use of the terms "reimburse" and "reimbursement" in R.C. Title 3, I am constrained to view the use of the word "employ" in R.C. 305.14 and R.C. 309.09 in a more united way than did my predecessor in Op. No. 80-076. Had the General Assembly intended to allow a county officer to hire his own attorney without the approval or prior consent of the prosecuting attorney, board of county commissioners, [*13] or the court of common pleas, and then seek reimbursement of those fees at the conclusion of a lawsuit, the General Assembly would not have had any difficulty in expressing that intention having used the word "reimburse" freely elsewhere in R.C. Title 3. See *Lake Shore Electric Railway Co. v. Public Utilities Commission of Ohio*, 115 Ohio St. 311, 319, 154 N.E. 239, 242 (1926) (had the legislature intended a term to have a particular meaning, "it would not have been difficult [for it] to find language which would express that purpose," the legislature having used that language in other connections). I also note that prior to Op. No. 80-076, two of my predecessors had concluded that:

In the employment of legal counsel to assist the prosecuting attorney under authority of Section 2412 of the General Code [predecessor of R.C. 305.14], it is necessary to secure the authority of the common pleas court upon application of the prosecuting attorney and the board of county commissioners in office at the time such counsel is to be employed. (Emphasis added.) 1927 Op. Att'y Gen. No. 364, p. 622 (syllabus). See also 1932 Op. Att'y Gen. No. 4255, p. 581 (citing 1927 0p. [614] No. 364 with approval). Similarly, the Ohio Supreme Court implicitly required, as a general rule, that counsel appointed pursuant to R.C. 305.14 be hired while the action is still pending. State ex rel. *Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 465, 423 N.E.2d 105, 110 (1981) ("R.C. 305.14 confers power upon the common pleas court to authorize the appointment of legal counsel other than the prosecuting attorney to represent a county board or officer in a pending action where to do so is in the best interest of the county") (emphasis added). Finally, I observe that to allow reimbursement of the judge's legal fees in the circumstances described in your letter would defeat the cost-controlling procedure established in R.C. 305.17 under which the board of county commissioners is to "fix the compensation of all persons appointed or employed under sections 305.13 to 305.16 . . . of the Revised Code. . . ." Accordingly, because R.C. 305.14 authorizes the "employment' of legal counsel, I conclude that the General Assembly did not intend to authorize the reimbursement of county officers who have

privately employed legal counsel. (Op. No. 80-076, syllabus, paragraph three, overruled.) [*15]

I turn now to the question whether R.C. 2744.07 authorizes a county to reimburse a county employee for legal expenses he has incurred in retaining private counsel to represent him when the employee did not request that the county provide trio with a defense while the action was pending. As I have already noted, R.C. 2744.07(A)(1) provides in pertinent part:

[a] political subdivision shall provide for the defense of an employee, in any state or federal court, in any civil action or proceeding to recover damages for injury, death, or loss to persons or property allegedly caused by an act or omission of the employee in connection with a governmental or proprietary function if the act or omission occurred or is alleged to have occurred While the employee was acting in good faith and not manifestly outside the scope of his employment or official responsibilities. (Emphasis added.)

You indicate in your letter that one of the legal actions for which the judge seeks reimbursement was a disciplinary action against the judge. A disciplinary action is clearly not a "civil action or proceeding to recover damages for injury, death, or loss to persons or property allegedly caused by [616] an act or omission of the employee. . . ." Accordingly, I conclude that R.C. 2744.07(A)(1) does not require

a county to reimburse a judge for legal expenses incurred in defending a disciplinary action.

In contrast, the defamation action filed against the judge does fall within the ambit of R.C. 2744.07(A)(1), and I must therefore determine whether or not that section requires or allows a county to reimburse a judge for legal expenses incurred in defending that case. R.C. 2744.07 (A)(1) provides that a political subdivision shall "provide for the defense" of one of its employees in certain circumstances. Although the phrase "provide for the defense" might arguably include reimbursement for defense expenses already incurred, I conclude that it does not for two reasons. First, I note that R.C. 2744.01(A)(2) provides that a political subdivision shall indemnify and bold harmless" its employees free paying certain types of judgments; if the General Assembly had intended that political subdivisions "indemnify and hold harmless" its employees free paying fees for hiring private legal counsel, it could easily have included such a provision in R.C. 2744.01. See *Lake Shore Electric [*17] Railway Co. v. Public Utilities Commission of Ohio*, 115 Ohio St. 311, 319, 154 ICE. 239, 242 (1926) ("[i]f the Legislature . . . [had intended a certain result] it would not have been difficult to find language which would express that purpose," the legislature having used that language in other connections). Second, I note that R.C. 2744.07(B) restricts the decision-making power of employees in actions in which a political subdivision provides for an employee's defense:

(1) A political subdivision say enter into a consent judgment or settlement and may secure releases from liability for itself or an employee, with respect to any claim for injury, death, or loss to persons or property caused by an act or omission in connection with a governmental or proprietary function.

(2) No action or appeal of any kind shall be brought by any person, including any employee or a taxpayer, with respect to the decision of a political subdivision pursuant to divisions (B)(1) of this section whether to enter into a consent judgment or settlement or to secure releases, or concerning the amount and circumstances of a consent judgment or settlement. Amounts expended for any settlement shall [*18] be from funds appropriated for this purpose. (Emphasis added.)

Thus, the General Assembly apparently intended that R.C. 2744.07 give a political subdivision the authority not only to provide a defense to an employee under certain circumstances, but also to decide, within certain limits, what type of defense will be offered. An interpretation of R.C. 2744.07 that would allow a county employee to be reimbursed for legal expenses incurred in an action in which the county had no opportunity to participate Would directly contradict this intention. See R.C. 1.47(B) ("[i]n enacting a statute, it is presumed that . . . [t]he entire statute is intended to be effective). Cf. *Sullivan v. Ohio Rehabilitation Services Commission*, 31 Ohio App. ad 144, 508 N.E.2d

1025 (Franklin County 1986) (holding that before bringing an action for reimbursement of attorney fees incurred to defend a civil damage claim, a state employee must show that he requested representation from the Attorney General under R.C. 109.361 and was denied, and generally discussing the policy supporting the discretion vested in the Attorney General to make the determination of whether or not special counsel [619] should be hired in a particular case). I as also mindful of the well-recognized rule that public money may be spent only on the basis of clear and unequivocal statutory authority. See generally State ex rel. A. *Bentley & Sons Co. v. Pierce*, 96 Ohio St. 44, 117 N.E. 6 (1917) (syllabus, paragraph three) ("[i]n the case of doubt as to the right of any administrative board [such as a board of county commissioners] to expend public moneys under a legislative grant, such doubt oust be resolved in favor of the public and against the grant of powers). Thus, I conclude that the language in R.C. 2744.07(A)(1) that authorizes a political subdivision to "provide for a defense" for an employee does not authorize the subdivision to reimburse the employee for costs incurred in retaining private counsel to defend a case in which the political subdivision did not participate and the employee's request for reimbursement was not made until after the case was dismissed.

Accordingly, it is my opinion and you are advised:

1. A common pleas court judge is a county officer for purposes of R.C. 305.14 and R.C. 309.09.

2. A common pleas court judge is an employee of the county in which he serves [620] for purposes of R.C. 2744.07.

3. R.C. 309.09 and R.C. 305.14 do not authorize a board of county commissioners to reimburse a county officer for expenses incurred in a legal action which is no longer pending. (1980 Op. Att'y Gen. No. 80-076, syllabus, paragraph three, overruled.)

4. R.C. 2744.07(A)(1) does not authorize a political subdivision to reimburse an employee for or indemnify an employee against costs incurred in retaining private counsel in an action in which the political subdivision did not participate and the employee's request for reimbursement was not made until after the case was dismissed.

OFFICE OF THE ATTORNEY GENERAL OF OHIO
OPINION NO. 85-014
1988 Ohio AG LEXIS 55; 1988 Op. Atty Gen. Ohio 250
April 9, 1985

SYLLABUS:
[*1]

Pursuant to R.C. 309.09, a prosecuting attorney has the duty, upon request, to advise and represent a judge of the court of common pleas of his county as nay be appropriate in connection with a situation in which an affidavit of bias and prejudice has been filed against the judge, and also has the duty to represent the bailiff of that judge, as say be appropriate, if the bailiff is deposed in connection with the affidavit of bias and prejudice.

OPINION BY: ANTHONY J. CELEBREZZE, JR.,
Attorney General

OPINION:

The Honorable Craig S. Albert
Geauga County Prosecuting Attorney
Court House Annex
Chardon, Ohio 44024

You have requested an opinion concerning the question whether a county prosecutor has an obligation to represent a common pleas judge of his county when the judge has an affidavit of bias and prejudice filed against trio. You have also asked whether the county prosecutor has the obligation

to represent the bailiff of that cocoon pleas judge when the bailiff is deposed by attorneys who are seeking to establish that the common pleas judge was biased against their law fire.

The general duties of a prosecuting attorney to provide representation for, and legal counsel to, county officials are set [62] forth in R.C. 309.09(A), as follows:

The prosecuting attorney shall be the legal adviser of the board of county commissioners, board of elections, and all other county officers and boards, including all tax supported public libraries, and any of them may require written opinions or instructions from him in matters connected with their official duties. Be shall prosecute and defend all suits and actions which any such officer or board directs or to which it is a party, and no county officer nay employ any other counsel or attorney at the expense of the county, except as provided in section 305.14 of the Revised Code. (Emphasis added.)

Pursuant to this provision, the prosecuting attorney is responsible for acting as legal adviser to all county officers and boards, and for prosecuting and defending all suits and actions which they direct or to which they are parties. Further, "no county officer say employ any other counsel or attorney at the expense of the county," except as provided in R.C. 305.14.

R.C. 305.14 states, with respect to the employment of counsel other than the prosecuting attorney to represent a county officer:

The court of common pleas, [63] upon the application of the prosecuting attorney and the board of county commissioners, may authorize the board to employ legal counsel to assist the prosecuting attorney, the board, or any other county officer in any matter of public business coming before such board or officer, and in the prosecution or defense of any action or proceeding in which such board or officer is a party or has an interest, in its official capacity.

Thus, the prosecuting attorney and the board of county commissioners may ask the court of common pleas to authorize the employment of legal counsel other than the prosecuting attorney to represent a county officer in a particular instance.

The question whether the county prosecutor has a general duty under R.C. 309.09 to provide legal counsel to a common pleas judge turns on the question whether such a judge is a county officer for purposes of R.C. 309.09. As your letter of request notes, one of my predecessors concluded in 1955 Op. Att'y Gen. No. 5666, p. 366, that a county probate judge was a county officer for purposes of R.C. 309.09. At that time, the probate court was separate from the court of common pleas. It is now a division of the court of common [*4] pleas. Ohio Const. art. IV, @ 1;

R.C. 2101.01. I find that the conclusion reached in 1955 Op. No. 5666--that, for purposes of R.C. 309.09, a probate judge is a county officer--is persuasive, and that, under the existing scheme of organization of the judiciary, it may reasonably be extended to all judges of the court of common pleas. See generally 1964 Op. Att'y Gen. No. 760, p. 2-3 (finding that juvenile judge (then judge of independent juvenile court, court of domestic relations, or probate court) was county officer, deputy, or employee for purposes of R.C. 325.20); 1962 Op. Att'y Gen. No. 2919, p. 238 (finding that probate judge (then judge of independent probate court) was county officer under R.C. 325.27). Thus, for purposes of your questions, I consider the judge of a court of common pleas to be a county officer, as that term is used in R.C. 309.09.

I am aware that there may be some controversy concerning the classification of a common pleas judge as a county officer for purposes of R.C. 309.09, since the court of cocoon pleas is, in some sense, an instrumentality of the state, and a common pleas judge is considered to be a state officer for certain other purposes. [*5] See *Tymcio v. State*, 52 Ohio App. 2d 298, 369 N.E.2d 1063 (Franklin County 1977); State ex rel. *Justice v. Thomas*, 35 Ohio App. 250, 256, 172 N.E. 397, 398-99 (Marion County 1930) (the common pleas court judge "is elected in the county" which he resides, and normally serves there, but is vested with statewide jurisdiction. The state pays by far the greater part of his compensation; so that it is doubtful if he is, within

the strict interpretation of the law, a county official"); 1971 Op. Att'y Gen. No. 71-075 (judges of the court of common pleas are "elected state officials" for purposes of R.C. 145.381, relating to membership in the public employees retirement system). A common pleas judge is paid in part by the state, R.C. 141.04; see R.C. 141.06, and in part by the court in which he resided when elected or appointed, R.C. 141.05. See also R.C. 141.07. A common pleas judge is, however, "elected by the electors" of the county in which his court is located, Ohio Const. Art. IV, @ 6; see R.C. 2301.01, and it is the county which funds the operations of the common pleas court. See, e.g., R.C. 305.22; R.C. 307.01 (held unconstitutional, in part, [*6] in *In re Furnishings for Courtroom Two*, 66 Ohio St. 2d 427, 423 N.E.2d 86 (1981)); State ex rel. *Slaby v. Summit County Council*, 7 Ohio App. ad 199, 454 N.E.2d 1379 (Summit County 1983). In light of the close connection between the court of cordon pleas and the county which it serves, I find that a common pleas judge is a county officer for purposes of obtaining legal representation under R.C. 309.09. See 1955 Op. No. 5666. Cf. State ex rel. *Attorney General v. Brennan*, 49 Ohio St. 33, 38-39, 29 N.E. 593, 594 (1892) (where . . . duties are wholly performed within the lion's of a county, and for the people of that county, the salary to be paid by the disbursing officer of the county, free the funds of the county, the office is a county office, and . . . the person lawfully filling such place is necessarily a county officers); 1970 op. Att'y Gen. No. 70-029 (a municipal judge and the clerk of a municipal court are municipal

officers for purposes of representation by the city solicitor). See generally R.C. 109.36-.365 (providing for Attorney General to represent and defend officers and employees of the state in civil actions instituted against thee); *Tymcio [*7] v. State* (the state's waiver of immunity under the Court of Claims Act does not extend to a court of common pleas).

Your questions concern the obligation of county prosecutor to provide representation in connection with an affidavit of bias and prejudice filed against a common pleas judge. Such an affidavit is authorized by R.C. 2701.03. When the question with which you are concerned arose, R.C. 2701.03 nl read as follows:

When a judge of the court of comm on pleas is interested in a cause or matter pending before the court, is related to, or has a bias or prejudice either for or against, a party to a matter or cause pending before the court or his counsel, or is otherwise disqualified to sit in a cause or matter pending before the court, on the filing of an affidavit by any party to the cause or matter, or by the counsel of any party, setting forth the fact of the interest, bias, prejudice, or disqualification, the clerk of the court of common pleas shall enter the fact of the filing on the trial docket in the cause and forthwith notify the chief justice of the supreme court. The chief justice, or any judge of the supreme court designated by him, shall [*8] pass upon the disqualification of the judge pursuant to Section 5(C) of Article IV, Ohio

Constitution. If the chief justice, or any judge of the supreme court designated by him, finds that the judge is disqualified, the court of common pleas of which the disqualified judge is a member, or the chief justice, or any judge of the supreme court designated by his, if the disqualified judge is the only judge of the court of common pleas, shall assign the cause or setter to another judge. The judge so assigned shall try the matter or cause. The affidavit shall be filed not less than three days prior to the time set for the hearing in the matter or cause. (Emphasis added.) Pursuant to this provision, when any party or the counsel of any party files an affidavit setting forth the fact of interest, bias, prejudice, or disqualification of a common pleas judge, the chief justice of the Ohio Supreme Court, or any judge of the Ohio Supreme Court designated by him, shall pass upon the disqualification of the common pleas judge pursuant to Ohio Const. Art. IV, 5(C).

nl R.C. 2701.03 has been amended by Am. Sub. H.B. 426, 115th Gen. A. (1984) (eff. April 4, 1985) so that, as of April 4, 1985, the initial portion of that section reads as follows:

When a judge of the court of common pleas is interested in a cause or matter pending before the court, is related to, or has a bias or prejudice either for or against, a party to a matter or cause pending before the court or his counsel, or is otherwise disqualified to sit in a cause or matter pending before the court, any party to the cause or matter, or the

counsel of any party may file an affidavit with the clerk of the Supreme Court setting forth the fact of the interest, bias, prejudice, or disqualification. The clerk of the Supreme Court forthwith shall forward the affidavit to the chief justice of the supreme court and notify the clerk of the court of common pleas, and the clerk of the court of common pleas shall enter the fact of the filing on the trial docket in the cause.

The remainder of R.C. 2701.03 is unchanged. Pursuant to this amendment, an affidavit of bias and prejudice against a common pleas judge is to be filed with the clerk of the Ohio Supreme Court, and the responsibility for notifying the chief justice rests with that clerk, rather than with the clerk of the court of common pleas. The responsibility for passing upon the disqualification remains with the chief justice of the Ohio Supreme Court, or any judge of the Ohio Supreme Court designated by him. See Ohio Const. art. IV, @ 5. [*9]

Ohio Const. art. IV, @ 5(C) states:

The chief justice of the Supreme Court or any judge of that court designated by his shall pass upon the disqualification of any judge of the courts of appeals or courts of common pleas or division thereof. Rules say be adopted to provide for the hearing of disqualification matters involving judges of courts established by law.

Courts of common pleas are established by the Constitution. Ohio Const. art. IV, @@ 1, 4.

It is not clear precisely what type of representation of a common pleas judge would be appropriate in a situation in which an affidavit of bias and prejudice has been filed. The usual procedure in such a situation is for the judge simply to remove himself from the case. As was stated in *Cuyahoga County Board of Mental Retardation v. Association of Cuyahoga County Teachers*, 47 Ohio App. 2d 28, 35, 351 N.E.2d 777, 783 (Cuyahoga County 1975) (citations omitted): "[T]he Supreme Court has stated that it is ordinarily better for a judge to disqualify himself when an affidavit of bias and prejudice has been filed, even if be is entirely free of bias and prejudice, . . . and . . . we recognize that such is the usual practice in [610] Ohio, . . and favored by the law. . . ." See State ex rel. *Pratt v. Weygandt*, 164 Ohio St. 463, 132 N.E.2d 191 (1956); *State v. Browning*, 9 Ohio disc. 228, 224 N.E.2d 398 (Ct. App. Lawrence County 1967). There are, however, instances in which a common pleas judge against whom an affidavit has been filed feels that disqualification is inappropriate. In such instances, the judge may, pursuant to R.C. 2701.03 and Ohio Const. art. IV, @ 5(C), await the determination of the chief justice, or the judge designated by him, on the question of disqualification. See generally State ex rel. *Pratt v. Weygandt; Duncan v. State* ex rel. *Brown*, 82 Ohio St. 351, 92 N.E. 481 (1910); *City of Kettering v. Berger*, 4 Ohio App. 3d 254, 448 N.E.2d 458 (Montgomery County

1982); *State v. Cox*, 21 Ohio Dec. 299 (C.P. Hamilton County 1911).

No specific procedure has been established by Constitution, Statute, or rule to govern the determination of disqualification of a common pleas judge under R.C. 2701.03 and Ohio Const. art. IV, @ 5(C). It is, however, apparent that there may be a need for fact-finding on the part of the chief justice or other judge who passes upon [*11] the disqualification, and that the judge against whom the affidavit was filed may consider it appropriate to make a submission upon his own behalf. See R.C. 141.08 (providing for payment from the state treasury of expenses incurred by the chief justice "while performing his duties under the law and the constitution in determining the disqualifications of a common pleas judge); State ex rel. *Pratt v. Weygandt* (indicating that the chief justice, considering an affidavit of prejudice, held a hearing at which the judge named in the affidavit testified); State ex rel. *Turner v. Marshall*, 123 Ohio St. 586, 176 N.E. 454 (1931) (indicating that the judge named in an affidavit of prejudice filed a counter affidavit); *State v. Browning* (indicating that a hearing was held on an affidavit of prejudice and that the judge eared therein testified). See generally *Cuyahoga County Board of Mental Retardation v. Association of Cuyahoga County Teachers*, 47 Ohio App. 2d at 32 n. 2, 351 N.E.2d at 782 n. 2. It is, further, apparent that a judge may consider it prudent to have legal counsel in such matters. See *White v. Hicks*, 118 Ohio App. 56, 193

N.E.2d 193 (Ashtabula [*12] County 1961), appeal dismissed, 174 Ohio St. 102, 186 N.E.2d 834 (1962).

It is not clear that a proceeding on an affidavit of bias and prejudice is a "suit" or "action" to which a common pleas judge is a "party or which it is appropriate to "prosecute" or "defend" as those terms are used in R.C. 309.09. It has been stated that a judge against whom an affidavit is filed "is not a party and has no interest in the subject setter of the litigation in which the affidavit is filed, and hence has no right to appeal any order of disqualification." *White v. Hicks*, 118 Ohio App. at 58, 193 N.E2d at 194. Judge Taft, in a dissent to State ex rel. *Pratt v. Weygandt*, quoted *Berger v. United States*, 255 U.S. 22, 35 (1921), as follows: "of what concern is it to a judge to preside in a particular case; of what concern to other parties to have him so preside?" 164 Ohio St. at 479, 132 N.E.2d at 201. It has, further, been stated that, in passing upon an affidavit of bias and prejudice, a judicial officer performs a duty which, "while judicial in character, is distinct and separate from the duties of such judge while presiding over the court," and which say be characterized as the [*13] action of "an inquisitor into the conduct and attitude" of the judicial officer named in the affidavit. *State v. Lindsey*, 77 Ohio App. 191, 66 N.E.2d 256 (Hamilton County 1945). It is, however, not necessary for me to determine precisely how a proceeding on an affidavit of bias and prejudice is to be categorized, for, in light of my determination that a common pleas judge is a county officer for purposes of

R.C. 309.09, it is clear that the prosecuting attorney has a duty to provide whatever legal advice or representation is appropriate in a particular instance. This conclusion follows both from the language of R.C. 309.09 and free the fact that, if representation is not provided pursuant to R.C. 309.09, representation say be provided at county expense, pursuant to R.C. 305.14, "to assist . . . any . . . county officer in any matter of public business coming before such . . . officer, and in the prosecution or defense of any action or proceeding in which such . . . officer is a party or has an interest, in its official capacity."

The standard for determining whether a county officer is entitled to representation in a particular instance is whether he has an involvement in [*14] his official capacity. In State ex rel. *Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 423 N.E.2d 105 (1981), the Ohio Supreme Court considered a situation in which a prosecuting attorney brought an action against certain members of a county board of Mental retardation. The prosecutor refused to represent those members or to request that other counsel be provided pursuant to R.C. 305.14.

In fact, the prosecutor contended that the board members should not be allowed representation at public expense. The Ohio Supreme Court rejected that contention and concluded that the board members were entitled to representation at public expense because the action was brought against the board members in their official capacity, "to

recover from them for actions which they performed in their official capacity as members of the board of mental retardation in furtherance of the public functions of said board, rather than personally for their own benefit." 66 Ohio St. 2d at 464, 423 N.E.2d at 110 . The *Seminatore* case thus supports the proposition that a prosecuting attorney has a duty to provide representation to a county officer whenever that officer, in his official capacity, requires legal [*15] representation. n2 See generally Board of Education ex rel. *Bettnan v. Board of Education*, 17 Ohio N.P. (n.s.) 439 (C.P. Hamilton County 1914), aff'd, 4 Ohio App. 165 (Hamilton County 1915) (public officers acting in good faith to carry out official duties are entitled to have legal representation provided at public expense).

n2 It is apparent that a prosecuting attorney has no duty to advise a judge on matters that involve the exercise of judicial functions. See 1933 Op. Att'y Gen. No. 208, vol. I, p. 299 at 301 "[t]he existence of a legal adviser for a judge to give advice upon questions of law and procedure involved in cases would be an anomaly in our judicial system, and I am of the opinion that [G.C. 2917, now R.C. 309.09] does not depose such duty upon the prosecuting attorneys").

In determining when a prosecuting attorney has a duty to represent a county officer, my predecessors have applied essentially the same standard as that applied in the *Seminatore* case--that the duty exists whenever the facts and

circumstances show that the officer has engaged in a well-intended attempt to perform his official duties. e.9., 1980 Op. Att'y Gen. No. [*16] 80-076; 1977 Op. Att'y Gen. No. 77-039; 1954 Op. Att'y Gen. No. 4567, p. 570; 1933 Op. Att'y Gen. No. 1750, vol. II, p. 1603; 1912 Op. Att'y Gen. No. 40, vol. II, p. 1107. See generally 1972 Op. Att'y Gen. No. 72-076 (clarified and amplified by 1973 Op. Att'y Gen. No. 73-029). It has, thus, been recognized that the prosecuting attorney's duty to provide representation in a particular instance is conditioned upon his Baking the appropriate findings:

It cannot be said, therefore, that there is ever found, in a case of this sort [a civil action against the county coroner], a duty to defend as we normally understand that term. It would be more appropriate to say that the prosecuting attorney in such a case is under a duty to make a careful evaluation of such facts and circumstances and is then authorized to defend the officer concerned if such evaluation indicates that there is involved a well intentioned attempt to perform an official duty on the part of the defendant. 1954 Op. No. 4567 at 574 (emphasis in original). The decision as to whether to provide representation in a particular instance say be a difficult one, see Op. No. 77-039, depending upon the facts [*17] involved. Further, there say be some risk of liability in an action to recover public funds expended for a private purpose if the prosecuting attorney provides representation where there is a clear lack of good faith on the part of the public official.

See Op. No. 80-076. See generally Op. No. 72-076; 1971 Op. Att'y Gen. No. 71-080. Thus, the determination as to whether to provide representation in a particular instance oust be made by the county prosecutor, in light of all the circumstances, rather than by this office. I can, however, advise you generally that, pursuant to R.C. 309.09, a prosecuting attorney has a duty, upon request, to advise and represent a judge of the court of common pleas of his county as way be appropriate in connection with a situation in which an affidavit of bias and prejudice has been filed against the judge.

You have also asked whether the prosecuting attorney has a duty to represent the bailiff of the common pleas judge when the bailiff is deposed by attorneys who are seeking to establish that the common pleas judge was biased against their law firm. I believe that the duty of the prosecuting attorney to provide the common pleas judge [*18] with appropriate legal advice and representation in connection with an affidavit of bias and prejudice includes the duty to provide appropriate representation to any seater of the judge's staff who may be involved in the matter, provided that the facts and circumstances show that the individual staff member has engaged in a well-intended attempt to perform his job. See R.C. 309.09; R.C. 305.14. I find that the prosecutor's duty to represent such a staff seater exists as an adjunct to the prosecutor's duty to act as legal adviser for the common pleas judge and, thus, that the duty to represent exists regardless of whether the individual

staff member say himself be considered a county officer who is entitled to representation under R.C. 309.09. Cf. R.C. 109.36-.365 (expressly authorizing the Attorney General to represent and defend both officers and employees of the state); Op. No. 80-076 and 1933 Op. No. 1750 (deputy sheriff is officer for purposes of representation by prosecuting attorney). See generally Op. No. 72-076; Op. No. 71-080 (concept of public purpose has been expanding); 1928 Op. Att'y Gen. No. 2835, vol. IV, p. 2541. I conclude, therefore, that in the [*19] situation which you have described, the prosecuting attorney has the duty to represent the bailiff of the common pleas judge as say be appropriate under the circumstances. See generally 1927 Op. Att'y Gen. No. 689, vol. II, p. 1175.

It is, therefore, my opinion, and you are hereby advised, that, pursuant to R.C. 309.09, a prosecuting attorney has the duty, upon request, to advise and represent a judge of the court of common pleas of his county as may be appropriate in connection with a situation in which an affidavit of bias and prejudice has been filed against the judge, and also has the duty to represent the bailiff of that judge, as say be appropriate, if the bailiff is deposed in connection with the affidavit of bias and prejudice.

APPENDIX J

RULES AND STATUE

RULES OF JUVENILE PROCEDURE:

Rule 40 ..... **J-1**

OHIO RULES OF CIVIL PROCEDURE:

Rule 53 ..... **J-6**

Rule 75 ..... **J-12**

STATUTE:

U.S.C.A. § 2151.13 ..... **J-18**

RULE 40. REFEREES: APPOINTMENT; POWERS; DUTIES

(A) Appointment. The juvenile judge may appoint one or more referees. The appointment of a referee may empower him to act in a single proceeding or in a specified class of proceedings or portions thereof. The juvenile judge shall not appoint as referee any person who has contemporaneous responsibility for working with, or supervise ink the behavior of, children who are subject to dispositional orders of the appointing court or any other juvenile court.

(B) Powers. An order of reference to a referee may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of his report. Subject to the specifications and limitations stated in the order, the referee has and shall exercise the power of the court to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may summon and compel the attendance of witnesses and may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority

to put witnesses on oath and may himself examine them and may call parties to the action and examine them upon oath. The referee shall make a report to the proceeding, including evidence offered and excluded, in the same manner and subject to the same limitations as provided in Rule 37 for hearings by the court.

(C) Proceedings

(1) Meetings. When a special reference is made in a specific case, the clerk shall forthwith furnish the referee with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the referee shall forthwith set a time and place for the first meeting of the parties or their attorneys, or for the hearing of the case, to be held promptly after the date of the order of reference and shall notify the parties or their attorneys or both. When a general reference has been made for a specified class of proceedings or portions thereof, the clerk or the referee shall forthwith upon receiving the case set a time and place for hearing of the case, to be held promptly after receiving the case, and shall notify the parties or their attorneys or both.

Any party, on notice to the other parties and to the referee, may apply to the court for an order requiring the referee to expedite the matter and to make his report. If a party fails to appear at the time and place appointed, the referee may proceed *ex parte*, or, in his discretion, may take appropriate steps to have the absent party brought before

him forthwith or at a future day, or may adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) Witnesses. The parties may procure the attendance of witnesses before the referee by the issuance and service of subpoenas as provided in Rule 17. If without adequate excuse a witness fails to appear or to give evidence, he may be punished as for a contempt and be subject to the consequences, penalties, and remedies provided in Rule 17.

(D) Report

(1) Contents and Filing. The referee shall prepare a report upon the matters submitted by the order of reference or otherwise. The referee shall file the report with the judge and forthwith provide copies to the parties. The report shall set forth the findings of the referee upon the case submitted, together with a recommendation as to the judgment or order to be made in the case in question, but the referee shall file with the report a transcript of the proceedings and of the evidence only if the court so directs.

(2) Objections to Report. A party may, within fourteen days of the filing of the report, serve and file written objections to the referee's report. Such objections shall be considered a motion. Objections shall be specific and state with particularity the grounds therefor. Upon consideration of the objections the court may: adopt, reject or modify the

report; hear additional evidence; return the report to the referee with instructions; or hear the matter itself.

(3) Stipulation as to Findings. The effect of a referee's report is the same whether or not the parties have consented to the reference. When the parties stipulate in writing that a referee's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(4) Draft Report. Before filing the report a referee may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions. The referee shall sign any findings or decision and file it together with any exceptions.

(5) When Effective. The report of a referee shall be effective and binding only when approved and entered as a matter of record by the court. The referee's findings of fact must be sufficient for the court to make an independent analysis of the issues and to apply appropriate rules of law in reaching a judgment order. The court may adopt the referee's recommendations about appropriate conclusions of law and the appropriate resolution of any issues. However, the court shall determine whether there is any error of law or other defect on the face of the referee's report even if no party objects to such an error or defect. The court shall enter its own judgment on the issues submitted for action and report by the referee.

(6) Factual-Findings. A party may not assign as error the court's adoption of a referee's finding of fact unless an objection to that finding is contained in that party's written objections to the referee's report. The court may adopt any finding of fact in the referee's report without further consideration unless the party who objects to that finding supports that objection with a copy of all relevant portions of the transcript from the referee's hearing or an affidavit about evidence submitted to the referee if no transcript is available. In deciding whether to adopt a referee's finding of fact, the court may disregard any evidence which was not submitted to the referee unless the complaining party demonstrates that with reasonable diligence he or she could not have discovered and produced that evidence for the referee's consideration.

(7) Permanent and Interim Orders. The court may enter judgment on the basis of findings of fact contained in the referee's report without waiting for timely objections by the parties, but the filing of timely written objections to the referee's report shall operate as an automatic stay of execution of that judgment until the court disposes of those objections and thereby vacates, modifies or adheres to the judgment previously entered. The court may make an interim order on the basis of findings of facts contained in the referee's report without waiting for or ruling on timely objections by the parties where immediate relief is justified and such an interim order shall not be subject to the automatic stay caused by the filing of timely objections to the

report, but no interim order shall extend more than twenty-eight (28) days, unless within that time, for good cause shown, the court extends it for one like period.

[Amended July 1. 1975; amended effective July 1, 1985.]

RULE 53. Referees

(A) Appointment. The court may appoint one or more referees, who shall be attorneys at law admitted to practice in this state, to hear an issue or issues in any case in which the parties are not entitled to a trial by jury or in any case in which the parties consent in writing or in the record in open court, to submit an issue or issues to a court-appointed referee.

(B) Compensation. The compensation for the referee's services shall be fixed by the court and taxed as part of the costs in the case; however, where a full-time employee of the court serves as referee, no part of his salary shall be so taxed.

(C) Powers. The order of reference to a referee may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of his report. Subject to the specifications and limitations stated in the order, the referee has and shall

exercise the power to regulate all proceedings in every hearing before him as if by the court and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may summon and compel the attendance of witnesses and may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests and guarantees the costs, and the court so orders, the referee shall make a record of he evidence offered and excluded in the same manner as and subject to the same limitations upon a court sitting without a jury.

(D) Proceedings.

(1) Meetings. When a special reference is made in a specific case, the clerk shall forthwith furnish the referee with a copy of the order of reference. Upon receipt thereof unless the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the referee shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within a reasonable time after the date of the order of reference and shall notify the parties or their attorneys.

Either party, on notice to the other parties and to the

referee, may apply to the court for an order requiring the referee to expedite the proceedings and to make this report. If a party fails to appear at the time and place appointed, the referee may proceed *ex parte* or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) Witnesses. The parties may procure the attendance of witnesses before the referee by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, he may be punished as for a contempt and be subjected to the consequences, penalties and remedies provided in Rule 37 and Rule 45.

(3) Statement of accounts. When matters of accounting are in issue before the referee, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the referee may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

(E) Report.

(1) Contents and filing. The referee shall prepare a report upon the matters submitted by the order of reference. The referee shall file the report with the clerk of the court and shall mail a copy to the parties. In an action on the merits of an issue to be tried without a jury, the referee shall file with the report a transcript of the proceedings and of the evidence only if the court so directs.

(2) Objections to report. A party may, within fourteen days of the filing of the report, serve and file written objections to the referee's report. If objections are timely served and filed by any party, any other party may serve and file objections within two (10) days of the date on which the first objections were filed, or within the time otherwise prescribed by this rule, which ever period last expires. Such objections shall be considered a motion. Objections shall be specific and state with particularity the grounds therefor. Upon consideration of the objections, the court may: adapt, reject or modify the report; hear additional evidence; return the report to the referee with instructions; or hear the matter itself.

(3) Stipulation as to findings. The effect of a referee's report is the same whether or not the parties have consented to the reference. When the parties stipulate in writing that a referee's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(4) Draft report. Before filing the report a referee may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions. The referee shall sign any findings or decision and file it together with any exceptions.

(5) When effective. The report of a referee shall be effective and binding only when approved and entered as a matter of record by the court. The referee's findings of fact must be sufficient for the court to make an independent analysis of the issues and to apply appropriate rules of law in reaching a judgment order. The court may adopt the referee's recommendations about appropriate conclusions of law and the appropriate resolution of any issues. However, the court shall determine whether there is any error of law or other defect on the face of the referee's report even if no party objects to such an error or defect on the face of the referee's report even if no party object to such an error or defect. The court shall enter its own judgment on the issues submitted for action and report by the referee.

(6) Factual findings. A party may not assign as error the court's adoption of a referee's findings of fact unless an objection tot he finding is contained in the party's written objections to the referee's report. The court may adopt any finding of fact in the referee's report without further consideration unless the party who objects to the finding supports that objection with a copy of all relevant portions of the transcript from the referee's hearing or an affidavit

about evidence submitted to the referee if no transcript if available. In deciding whether to adopt a referee's findings of fact, the court may disregard any evidence which was not submitted to the referee unless the complaining party demonstrates that with reasonable diligence he or she could not have discovered and produced that evidence for the referee's consideration.

(7) Permanent and interim orders. The court may enter judgment on the basis of findings of fact contained in the referee's report without waiting for timely objections by the parties, but the filing of timely written objections to the referee's report shall operate as an automatic stay of execution of the judgment until the court disposes of those objections and thereby vacates, modified or adheres to the judgment previously entered. The court may make an interim order on the basis of findings of facts contained in the referee's report without waiting for or ruling on timely objections by the parties where immediate relief is justified and such an interim order shall not be subject to the automatic stay caused by the filing of timely objections to the report, but no interim order shall extend more than twenty-eight (28) days from the date of its entry, unless within that time, for good cause shown, the court extends it for one like period.

(Amended, eff. 7-1-75; 7-1-85)

RULE 75. Divorce, annulment and alimony actions.

(A) Applicability. These Rules of Civil Procedures all apply in actions for divorce, annulment, alimony and related proceedings, with the modifications or exceptions set forth in this rule.

(B) Joinder of parties. Rules 14, 19, 19.1 and 24 shall not apply in divorce, annulment, or alimony actions, however:

(1) A person or corporation having possession of, control of or claiming an interest in property, whether real, personal or mixed, out of which another seeks alimony or support, may be made a party defendant; or

(2) When it is essential to protect the interests of a child, the court may join the child of the parties as a party defendant and appoint a guardian ad litem, and legal counsel if necessary, for such child and tax the costs thereof; or

(3) When support is ordered, the court, on its own motion or that of an interested person, after notice to the part ordered to pay support and to his employer, may make such employer a party defendant.

(C) Trial by court or referee. In proceedings under this rule there shall be not right to trial by jury. All issues may be heard either by the court or by a referee as the court may, on the request of any party or on its own motion, direct. Rule 52 shall apply to all cases or issues directed to be heard by a referee.

(D) Investigation. On the filing of a complaint for divorce, annulment or alimony, where minor children are involved, or on the filing of a motion for change of custody of minor children, the court may cause an investigation to be made as to the character, family relations, past conduct, earning ability and financial worth of the parties to the action. The report of such investigation shall be made available to either party or his counsel of record upon written request not less than seven days before trial. Such report shall be signed by the investigator and the investigator shall be subject to cross-examination by either party concerning the contents of the report. The court may tax as costs all or any part of the expenses for each investigation.

(E) Subpoena where custody involved. In any case where custody of minor children is involved, the court, on its own motion, may cite either party to the action from any point within the state to appear in court and testify.

(F) Default. The provisions of Rule 55 shall not apply in Divorce, annulment, or alimony actions.

(G) Relief pending appeal: custody, support, alimony. The trial court may, when a motion to modify a custody, support or alimony order is filed prior to the filing of the notice of appeal, modify the order for the period of the pendency of the appeal upon such terms as to bond or otherwise a it considers proper for the security of the rights of the adverse party and in the best interest of the children

involved. Rule 62(B) does not apply to custody, alimony or support orders. When an appeal is taken by any party, the court of appeals may grant like orders concerning custody, support of alimony during the pendency of the appeal.

(H) Temporary restraining orders.

(1) Restraining order: exclusion. The provisions of Rule 65(A) shall not apply in divorce, annulment or alimony actions.

(2) Restraining order: grounds, procedure. When it is made to appear to the court by affidavit of a party sworn to absolutely (a) that a party is about to dispose of or encumber property, or any part thereof, so as to defeat the other party in obtaining alimony of support, or (b) that a party to the action or a child of any party is about to suffer physical abuse, annoyance or bodily injury by the other party, the court may allow a temporary restraining order, with or without bond, to prevent such action. A temporary restraining order may be issued without notice and shall remain in force during the pendency of the action unless the court orders otherwise.

(I) Continuing jurisdiction. The continuing jurisdiction of the court shall be invoked by motion filed in the original action, notice of which shall be served in the manner provided for the service of process under Rule 4 through Rule 4.6. When the continuing jurisdiction of the court is invoked by motion filed in the original action, notice of

which shall be served in the manner provided for the service of process under Rule 4 through Rule 4.6. When the continuing jurisdiction of the court is invoked pursuant to this subdivision, the discovery procedures set forth in Rule 26 through Rule 37 shall apply.

(J) Hearing. No action for divorce, annulment or alimony may be heard and decided until the expiration of forty-two days after the service of process or twenty-eight days after the last publication of notice upon the complaint; nor shall any such action be heard and decided earlier than twenty-eight days after the service of a counterclaim, which under this rule may be designated a cross-complaint, unless the plaintiff files a written waiver of such twenty-eight day period.

(K) Notice of Trial. In all cases where there is no counsel of record for the adverse party, the court shall give the adverse party notice of the trial upon the merits. The notice shall be made by regular mail to the party's last known address, and shall be mailed at least seven days prior to the commencement of trial.

(L) Testimony. Judgment for divorce, annulment or alimony shall not be granted upon the testimony or admission of a party not support by other credible evidence. No admission shall be received which the court has reason to believe was obtained by fraud, connivance, coercion or other improper means. The parties notwithstanding their

marital relations shall be competent to testify in such proceeding to the same extent as other witnesses.

(M) Allowance of alimony, child support and custody *pendente lite.*

(1) When requested in the complaint, answer or counter-claim, or by motion served with the pleading, upon satisfactory proof by affidavit duly filed with the clerk of the court, the court or referee, without oral hearing and for good cause shown, may grant alimony *pendente lite* to either of the parties for his sustenance and expenses during the suit and may make a temporary order regarding the custody, support, maintenance and care of minor children of the marriage, whether natural or by adoption, during the pendency of the action for divorce, annulment or alimony.

(2) Counter affidavits may be filed by the other party within fourteen days from the service of the complaint, answer, counter-claim or motion, all affidavits to be used by the court or referee in making a temporary alimony, child custody, support and care order; and, upon request in writing after any temporary alimony or child custody and support order is journalized, the court shall grant the party so requesting an oral hearing within twenty-eight days to modify such temporary order. A request for oral hearing shall not suspend or delay the commencement of alimony or support payments previously ordered or change the custody o children until the order is modified by journal entry after the oral hearing.

(N) Delay of decree. When a party who is entitled to a decree of divorce or annulment is ordered to pay alimony or support for a child not in his custody or to deliver a child to the party to whom custody is awarded, the court may delay entering a decree for divorce or annulment until the party, to the satisfaction of the court, secures the payment of the alimony or the support of such child or delivers custody of the child to the person granted custody.

(Amended, eff 7-1-71; 7-1-72; 7-1-77; 7-1-78)

§ 2151.13 Employees; compensation; bond

The juvenile judge may appoint such bailiffs, probation officers, and other employees as are necessary and may designate their titles and fix their duties, compensation, and expense allowances. The juvenile court may by entry on its journal authorize any deputy clerk to administer oaths when necessary in the discharge of his duties. Such employees shall serve during the pleasure of the judge.

The compensation and expenses of all employees and the salary and expenses of the judge shall be paid in semi-monthly installments by the county treasurer from the money appropriated for the operation of the court, upon the warrant of the county auditor, certified to by the judge.

The judge may require any employee to give bond in the sum of not less than one thousand dollars, conditioned for the honest and faithful performance of his duties. The sureties on such bonds shall be approved in the manner provided by section 2151.12 of the Revised Code. The judge shall not be personally liable for the default, misfeasance, or nonfeasance of any employee from whom a bond has been required.

(1953 H 1, eff. 10-1-53; GC 1639-18)

Historical and Statutory Notes

Pre-1953 H 1 Amendments: 121 v 557; 117 v 520

Cross References

Judges of the court of domestic relations, juvenile court responsibility, 2301.03

Peace Officer training, 109.73 et seq.

Library References

Courts 55 to 58.

WESTLAW Topic No. 106.

C.J.S. Courts § 107 to 100.

OJur 3d: 22, Courts and Judges § 109, 192, 204; 46, Family Law § 379

Kurtz & Giannelli, Ohio Juvenile Law (3d Ed.), Text 4.01, 4.03(F)

Merrick-Rippner, Ohio Probate Law (4th Ed.), Text 217.05(E), 223.08(A), 225.01(K); Forms 217.03 to 217.06

Notes of Decisions and Opinions

Civil Service 4

Compatibility of offices 3

Constitutional issues 1

Hiring and compensation 5

Termination 2

1. Constitutional issues

This section is not contra to O Const Art XV, § 10. State ex rel. Haskins v Tyroler (Ohio App. 1939) 63 Ohio App. 88, 25 N.E.2d 309, 16 O.O. 378, affirmed 137 Ohio St. 24, 27 N.E.2d 931, 17 O.O. 335.

2. Termination

Full-time juvenile court employees working part time at a juvenile detention center may be terminated from their part-time employment by the administrative judge of a juvenile court notwithstanding oral promises of continued employment that may have been made by the superintendent of the juvenile detention facility, as the terms of employment at juvenile detention facilities are governed by statute, not the doctrine of employment at will. Abbott v. Stepanik (App. 8 Dist. 1990) 64 Ohio App.3d 719, 582 N.E.2d 1082, dismissed, jurisdictional motion overruled 50 Ohio St.3d 717, 553 N.E.2d 1364.

County visitor appointed from a civil service eligible list by a juvenile court judge may be dismissed at the latter's discretion under this section. State ex rel. Haskins v. Tyroler (Ohio App. 1939) 63 Ohio App. 88, 25 N.E.2d 309, 16 O.O. 378, affirmed 137 Ohio St. 24, 27 N.E.2d 931, 17 O.O. 335.

A state judge firing a court employee such as a probation officer is not absolutely immune to a damage suit under 42 USC 1983 claiming sex discrimination, because a personnel

decision is an administrative act rather than an act of judging that is

protected from suit; whether the judge enjoys qualified immunity is a matter not now before the court. Forrester v. White (U.S.Ill. 1988) 108 S.Ct. 538, 484 U.S. 219, 98 L.Ed.2d 555, on remand 846 F.2d 29.

3. Compatibility of offices

The offices of township trustee and juvenile probation officer are compatible. OAG 73-035.

There is no incompatibility in the offices of probation officer in the juvenile court and executive secretary of the child welfare board, in the same county. 1951 OAG 961.

Positions of probation officer of a juvenile court and relief administrator of a city are not in themselves incompatible and may be held by one person at the same time, unless it is physically impossible to faithfully and efficiently discharge the duties of both position. 1941 OAG 3410.

The offices of a member of the county board of education and probation officer appointed under former GC 1662 (RC 2151.13) are incompatible. 1933 OAG 1926.

4. Civil service

Employees within the court of common pleas, division of domestic relations, are unclassified civil service employees. OAG 76-031.

Person employed within a juvenile court as chief probation officer, who also acts as county visitor for aid to dependent children, serves under this section, and is within the unclassified service of Ohio. 1939 OAG 1123.

Juvenile court code expressly takes out of the classified service of the civil service the employees and officers mentioned in this section, who must be appointed by the juvenile judge and hold their positions subject to his pleasure. 1937 OAG 1190.

5. Hiring and compensation

An administrative judge of the juvenile division of a court of common pleas is not authorized to enter into an employment agreement with employees of the court. Malone v. Court of Common Pleas of Cuyahoga County (Ohio 1976) 45 Ohio St.2d 245, 344 N.E.2d 126, 74 O.O.2d 413.

A juvenile judge may fix as the expense allowance of a bailiff, probation officer, or other employee appointed under that section a fixed sum to be paid periodically, provided that the amount paid shall never exceed the amount of actual compensable expense incurred in that period. 1958 OAG 2208.

GC 1639-18 (RC 2151.13) and GC 1639-57 (RC 2151.10) are mandatory as to appropriations for compensa-

tion of a chief probation officer and the administrative expenses of the court in connection with these statutes; the county commissioners must appropriate money for such purposes from the date act becomes effective. 1937 OAG 1246.

Under former GC 1662 (RC 2151.13) a probate judge could not fix the compensation of employees under such section in an amount in excess of the aggregate fixed by the county commissioners for such purposes. 1932 OAG 4045.

APPENDIX K

UNITED STATES DISTRICT COURT
NOTHERN DISTRICT OF OHIO
EASTERN DIVISION

COMPLAINT

Case No. 1:90-CV-2243
Filed December 17, 1990

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID M. MUMFORD, *Plaintiffs*, vs. JOSEPH C. ZIEBA, and LORAIN COUNTY COMMON COURT DOMESTIC RELATIONS DIVISION, *Defendants.*	)	Case No. 1:90CV 2243 Judge: COMPLAINT *(Jury Trial Demanded)*

PRELIMINARY STATEMENT

1. This is an action for declaratory' injunctive relief, and damages because of the acts by the Defendants, Joseph C. Zieba, Judge of the Lorain County Common Pleas Court, Domestic Relations Division and The Lorain County Common Pleas Court, Domestic Relations Division in discharging Plaintiff from his full-time position as Court Referee of The Domestic Relations Division in retaliation for exercising his First Amendment Rights.

2. This lawsuit is based on the Fourteenth and First Amendments to the United States Constitution, and 42 U.S.C. § 1983.

JURISDICTION

3. Jurisdiction over this action is based on 28 U.S.C. § 1343, 28 U.S.C. § 2201, and 42 U.S.C. § 1988.

PARITIES

4. Defendant Joseph C. Zieba during the relevant time was a Judge of the Lorain County Common Pleas Court, Domestic Relations Division and had final policy-making authority over hiring or firing employees of the Lorain County Common Pleas Court, Domestic Relations Division. He is being sued in his official and individual capacities.

5. Defendant Lorain County Common Pleas Court, Domestic Relations Division during the relevant time was the employer of the Plaintiff.

6. Plaintiff David M. Mumford worked for the Defendant Lorain County Common Pleas Court, Domestic Relations Division from January 22, 1979 through January 2, 1989, until his termination by Defendants after almost 10 years, occupying various positions, including Child Support Referee, Juvenile Referee, and Chief Referee, Domestic Relations Court.

FIRST CAUSE OF ACTION

7. The Plaintiff reasserts the foregoing allegations and incorporates them by reference as if fully set forth herein.

8. At the time of his termination, Plaintiff was the Chief Referee of the Lorain County Domestic Relations Court, which is not a policy-making or confidential position, since it did not have any responsibility with respect to the overall operation of the Lorain County Common Pleas Court, Domestic Relations Division.

9. Plaintiff David M. Mumford is a registered Democrat. He has been active in Lorain County Democratic political activities since 1976. He is a precinct committee-person for the Democratic Party in Lorain County.

10. Defendant Joseph C. Zieba is a registered Republican and ran for his current position as Judge of the Domestic Relations Division of the Lorain County Common Pleas Court in the Republican Primary in Lorain County in 1988.

11. Plaintiff David M. Mumford supported Judge Henry T. Webber, during the Democratic Primary and General Election in 1988. Democratic Incumbent Judge Webber opposed Republican Joseph C. Zieba in the General Election in November of 1988.

12. During that campaign, Joseph Zieba told Plaintiff David M. Mumford "don't get caught in the cross-fire."

13. On election day, in early November, 1988, Joseph Zieba saw Plaintiff David M. Mumford handing out literature for Democrat Henry T. Webber.

14. After almost 10 years of faithful service to Defendant Lorain County Domestic Relations Court, Plaintiff David M. Mumford was terminated from his full-time position as Chief Referee for Lorain County Domestic Relations Court. Plaintiff David M. Mumford was informed of this termination on or about December 23, 1988, via a certified letter mailed to him on December 22, 1988 by Judge-Elect Joseph C. Zieba, which stated in its entirety "Please be advised that my term of office as Judge, Lorain County Domestic Relations Court, commences on Tuesday January 3, 1989. I wish to advise you that you will not be retained and your services will not be required at that time."

15. After Plaintiff David Mumford was terminated, and upon Judge-Elect Zieba's taking office, two longstanding Republicans, Adelbert Andrew Balunek and John Richard Musson were hired to perform the work previously done by Plaintiff David M. Mumford.

16. Defendant Zieba also terminated at least 13 other registered Democrats holding various positions within the Lorain County Domestic Relations Court. Those Democrats also supported Judge Webber against Defendant Zieba. They were all also told of their terminations before Defendant Zieba assumed his office as Judge of Lorain County Domestic Relations Court.

17. Plaintiff was an excellent employee and had always received good evaluations for the performance of his duties with the Lorain County Common Pleas Court, Domestic Relations Division.

18. Plaintiff's employment was terminated because he and others did not support and were not members of the Republican Party. Plaintiff's employment was terminated by the Defendants in retaliation for his exercising his rights under the First Amendment to the United States Constitution.

19. Defendants' adopting and implementing this custom or policy of terminating court employees because of their political belief has resulted in limiting Plaintiff's ability to find substantial comparable gainful employment.

20. Defendants' actions in discharging Plaintiff without just cause because of his exercising his rights under the First Amendment to the United States Constitution

violates the First and Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

21. As a direct and proximate result of Defendant Zieba's actions and inactions, Plaintiff has suffered, and will continue to suffer, loss of wages and benefits and loss of reputation which will be proven at trial.

22. Defendant Zieba's actions were taken in reckless disregard of Plaintiff Mumford's Constitutional Rights, and as such, Plaintiff Mumford is entitled to an award of punitive damages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court grant him relief as follows:

1. A declaratory judgment declaring that the Defendants' customs and policies regarding Plaintiff's employment, violates his rights under the First and Fourteenth Amendment to the United States Constitution.

2. An order preliminarily and permanently requiring the Defendants to make him whole, by reinstating him to the position of Chief Referee, Domestic Relations Court, awarding him appropriate back pay, benefits and related costs including pre-judgment and post-judgment interest at prevailing rates on all sums awarded.

3. An award of $90,000.00 in punitive damages to be assessed against Defendant Zieba for discharging Plaintiff in reckless disregard of Plaintiff Mumford's Constitutional Rights.

4. Grant the Plaintiff reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988.

/s/DENNIS J. NIERMANN (0007988)
EDWARD G. KRAMER (0024873)
KRAMER & TOBOCMAN CO., LPA
3214 Prospect Avenue, East
Cleveland, Ohio 44115-2600

(216) 431-5300
Attorneys for Plaintiff

JURY TRIAL DEMANDED

Plaintiff demands a jury trial on all issues triable to a jury.

/s/DENNIS J. NIERMANN

APPENDIX L

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SEPARATE ANSWER OF DEFENDANT,
JOSEPH C. ZIEBA, JUDGE, LORAIN COUNTY,
OHIO COURT OF COMMON PLEAS,
DOMESTIC RELATIONS DIVISION

Case No. 1:90 CV 2243
Filed January 28, 1991

Pages L-1 thru L-10

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID M. MUMFORD,	) Case No. 1:90-CV-2243
Plaintiffs,	) JUDGE: KRENZLER
VS.	)
	) Separate Answer of Defendant,
JOSEPH C. ZIEBA,	) JOSEPH C. ZIEBA, JUDGE,
et al.	) *(Jury Demanded)*
Defendants.	)

Now comes the Defendant, Joseph C. Zieba, Judge, Lorain County, Ohio Common Pleas Court, Domestic Relations Division, by and through his attorney, the Lorain County, Ohio Prosecutor's Office, and for his Separate Answer, states as follows:

1. Specifically denies any and all allegations of actionable conduct contained in Paragraph One (1) of the Complaint.

2. Admits the allegations contained in Paragraph Two (2) of the Complaint; and specifically denies that any act and/or omission on the part of this Separate Answering Defendant violated the First Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment to the United States Constitution. Additionally, this Separate Answering Defendant specifical

ly denies that any act and/or omission on his part violated 42 U.S.C. Section 1983.

3. Denies the allegations contained in Paragraph Three (3) of the Complaint.

4. Admits the allegations contained in Paragraph Four (4) of the Complaint; and states that this Separate Answering Defendant was empowered with other duties, responsibilities and powers not mentioned in said Paragraph.

5. Admits the allegations contained in Paragraph Five (5) of the Complaint.

6. As to the allegations contained in Paragraph Six (6) of the Complaint, admits that Plaintiff, David Mumford, worked for Defendant, Lorain County, Ohio Common Pleas Court, Domestic Relations Division, in various positions, as alleged in said Paragraph, commencing on January 22, 1979; and specifically denies that the Plaintiff was terminated on January 2, 1989, as alleged in said Paragraph.

7. Specifically denies each and every allegation contained in Paragraph Eight (8) of the Complaint.

8. As to the allegations contained in Paragraph Nine (9) of the Complaint, states that upon this Separate Answering Defendant's information and belief, the Plaintiff may be a registered democrat as alleged in said Paragraph; and

denies, for want of knowledge and/or information sufficient to form a belief as to truth or falsity, each and every remaining allegation contained in said Paragraph.

9. Admits the allegations contained Paragraph Ten (10) of the Complaint.

10. Admits the allegations contained in Paragraph Eleven (11) of the Complaint.

11. Admits the allegations contained in Paragraph Twelve (12) of the Complaint; and further states that when said comment was made, this Separate Answering Defendant was not acting under color of state law.

12. Denies, for want of knowledge and/or information sufficient to form a belief as to truth or falsity, each and every allegation contained in Paragraph Thirteen (13) of the Complaint.

13. As to the allegations contained in Paragraph Fourteen (14) of the Complaint, admits that Plaintiff, David M. Mumford, was informed of his termination by correspondence dated December 22, 1988, as alleged in said Paragraph; specifically denies any and all allegations contained in said Paragraph relative to the Plaintiff's self-proclaimed alleged faithful service with Defendant, Lorain County, Ohio Court of Common Pleas, Domestic Relations Division; and further states that when the subject

correspondence was authored, this Separate Answering Defendant was not acting under color of state law.

14. As to the allegations contained in Paragraph Fifteen (15) of the Complaint, admits that Adelbert Andrew Balunek and John Richard Musson were hired, each on a part-time basis, to act as referees for the Lorain County, Ohio Court of Common Pleas, Domestic Relations Division, as alleged in said Paragraph; and specifically denies that Attorney Balunek and Attorney Musson were specifically hired to "replace" the Plaintiff. Moreover, the political affiliation of Attorney Balunek and Attorney Musson was not relevant to and/or a prerequisite for their respective employment with the Lorain County, Ohio Court of Common Pleas, Domestic Relations Division.

15. Admits the allegations contained in Paragraph Sixteen (16) of the Complaint; and further states that the terminations referred to in said Paragraph did not violate any state and/or federal right, privilege, and/or immunity secured by the constitutions and laws of the United States and/or the State of Ohio, of the affected employees.

16. Specifically denies each and every allegation contained in Paragraph Seventeen (17) of the Complaint.

17. Specifically denies each and every allegation contained in Paragraph Eighteen (18) of the Complaint.

18. Specifically denies each and every allegation of actionable conduct contained in Paragraph Nineteen (19) of the Complaint; and denies, for want of knowledge and/or information sufficient to form a belief as to truth or falsity, each and every allegation of alleged damage and/or injury contained in said Paragraph.

19. Specifically deny each and every allegation contained in Paragraph Twenty (20) of the Complaint.

20. Specifically denies each and every allegation of actionable conduct contained in Paragraph Twenty-one (21) of the Complaint; and denies, for want of knowledge and/or information sufficient to form a belief as to truth or falsity, each and every allegation of alleged injury and/or damage contained in said Paragraph.

21. Specifically denies each and every allegation contained in Paragraph Twenty-two (22) of the Complaint.

22. Specifically denies each and every allegation in the Complaint, unless expressly admitted herein.

FIRST AFFIRMATIVE DEFENSE

23. The Plaintiffs Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

24. The Plaintiff has failed to join parties who are necessary and proper for the just and complete adjudication of the within matter.

THIRD AFFIRMATIVE DEFENSE

25. The Plaintiff's complaint is barred by the applicable statute of limitations.

FOURTH AFFIRMATIVE DEFENSE

26. The Plaintiff's termination did not violate the First Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment to the United States Constitution.

FIFTH AFFIRMATIVE DEFENSE

27. The Plaintiff's termination did not deprive him of any rights, privileges, and/or immunities allegedly secured to him by the constitution and laws of the United States.

SIXTH AFFIRMATIVE DEFENSE

28. At all times relevant herein, the Plaintiff was an employee at will, subject to discharge at any time regardless

of cause under the common law of the State of Ohio, as well as pertinent provisions of the Ohio Revised Code. As such, the Plaintiff cannot now maintain an action for alleged wrongful discharge.

SEVENTH AFFIRMATIVE DEFENSE

29. This Separate Answering Defendant is absolutely immune from suit under the facts and circumstances of the case sub judice.

EIGHTH AFFIRMATIVE DEFENSE

30. At the time of his termination, the Plaintiff did not have a clearly established right, as guaranteed by the Constitution of the United States, for continued employment as a domestic relations court referee.

NINTH AFFIRMATIVE DEFENSE

31. This Separate Answering Defendant is immune from suit under the doctrine of qualified good faith immunity.

TENTH AFFIRMATIVE DEFENSE

32. As a matter of law, a domestic relations court referee is a confidential and/or policy making position.

ELEVENTH AFFIRMATIVE DEFENSE

33. The Plaintiff was terminated solely for poor job performance.

TWELFTH AFFIRMATIVE DEFENSE

34. This Separate Answering Defendant did not terminate the Plaintiff solely because of the Plaintiff's political affiliation.

THIRTEENTH AFFIRMATIVE DEFENSE

35. The Plaintiff cannot recover punitive damages under the facts and circumstances of the case at bar.

FOURTEENTH AFFIRMATIVE DEFENSE

36. The Plaintiff failed to mitigate any damages allegedly sustained by the alleged actionable conduct of this Separate Answering Defendant, which alleged actionable conduct is specifically denied by this Separate Answering Defendant.

WHEREFORE, having fully answered Defendant, Joseph C. Zieba, Judge, Lorain County, Ohio Common Pleas Court, Domestic Relations Division, respectfully requests this Honorable Court to dismiss the Plaintiff's Complaint, with prejudice, and permit this Separate An-

swering Defendant to go hence without cost.

Respectfully submitted,
GREGORY A. WHITE #0019528
Prosecuting Attorney
Lorain County, Ohio

/s/ Robert Flanagan
M. Robert Flanagan #0021726
Assistant Prosecuting Attorney
Lorain County, Ohio

Attorney For Defendant,
Joseph C. Zieba, Lorain County,
Ohio Common Pleas Court,
Domestic Relations Division
226 Middle Avenue, 3d Floor
Elyria, Ohio 44035

Phone: (216) 329-5398

JURY DEMAND

Defendant, Joseph C. Zieba, Judge, Lorain County, Ohio Court of Common Pleas, Domestic Relations Division, hereby requests trial by jury.

/s/ Robert Flanagan
M. Robert Flanagan #0021726
Assistant Prosecuting Attorney
Lorain County, Ohio

Attorney For Defendant,
Joseph C. Zieba, Lorain County,
Ohio Common Pleas Court,
Domestic Relations Division

PROOF OF SERVICE

This is to certify that a copy of the foregoing Separate Answer of Defendant, Joseph C. Zieba, Judge, Lorain County, Ohio Court of Common Pleas, Domestic Relations Division, was served upon Dennis J. Niermann, attorney for plaintiff, at 3214 Prospect Avenue East, Cleveland, Ohio 44115-2600 by regular U.S. Mail this 28th day of January, 1991.

/s/ Robert Flanagan
M. Robert Flanagan #0021726
Assistant Prosecuting Attorney
Lorain County, Ohio
Attorney For Defendant,
Joseph C. Zieba, Lorain County,
Ohio Common Pleas Court,
Domestic Relations Division

APPENDIX M

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

AFFIDAVIT OF CATHERINE CATANZERITE

taken November 12, 1990

Pages M-1 thru M-3

COUNTY OF LORAIN)
) SS: Affidavit of
STATE OF OHIO) CATHERINE CATANZERITE

Before me this day personally appeared Catherine Catanzerite, who, being first duly sworn, deposes and says:

That David M. Mumford was employed as a Court Referee for ten years in the Lorain County Domestic Relations Court, the last five years as Chief Referee. Within the proper chain of command, the position of Chief Referee fell under my direct supervision as Court Administrator.

This job was not based upon political party affiliation but rather was based upon a more formal structure as an attorney hearing divorce and juvenile cases assigned by Judge Webber.

Mr. Mumford was not considered as part of the administrative staff. He did not have access to official Court records other than the individual cases he was assigned to hear. His job duties and authority were well defined in the performance of these duties. Political loyalty was not necessary. He had no authority to determine how the Court was to be run and did not handle sensitive information that would affect Court policy.

Any advice given to other Court employees by Mr. Mumford was not political in nature but given to assure

compliance with existing statutes on divorce and juvenile law. He was not responsible for making final decisions regarding the operation of the Court.

The Chief Referee did not have face to face contact with Judge Webber on a daily basis. Mr. Mumford had his own schedule of cases and set his own time to hear these. His job was not to work every day within the immediate work environment of the Judge like the Judge's bailiff, personal secretary, and Court reporter.

The decisions made by Mr. Mumford in the performance of his job duties were not to carry out any political policies for Judge Webber. He did not have the authority to hire and fire and was not considered a department head. He had no authority over the other Court Referees other than to assist them with the disposition of their cases.

Mr. Paul Timko defeated Judge Joseph Zieba for Lorain Municipal Court Judge. At the time, Mr. Timko was Chief Referee for Judge Webber. Judge Zieba has publically stated that he ran against Judge Webber for Domestic Relations Court Judge due to the fact that Judge Webber supported Mr. Timko.

Due to Judge Zieba's vindictive motive against Judge Webber, he fired Mr. Mumford who had become Chief Referee for Judge Webber.

David Mumford's qualifications and record as a Court Referee were outstanding. Judge Zieba fired him on December 22, 1988, approximately two weeks before he took office as Administrative Judge. Therefore, Judge Zieba had no personal knowledge of Mr. Mumford's qualifications or how he functioned as a Court Referee.

/s/ Catherine Catanzerite
Catherine Catanzerite

Sworn to and subscribed before me this 12th day of November, A.D. 19 90 .

/s/ Dennis J. Nierman
Notary Public
State of Ohio
My commission expires

APPENDIX N

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

AFFIDAVIT OF DAVID M. MUMFORD

taken August 29, 1991

Pages N-1 thru N-5

COUNTY OF LORAIN)
) SS: Affidavit of
STATE OF OHIO) **DAVID M. MUMFORD**

NOW COMES THE AFFIANT, DAVID M. MUMFORD, first having been duly sworn and placed under oath, and deposes and says:

1. I became employed by the Lorain County Domestic Relations Court on or about January of 1979.

2. I worked from January 22, 1979 through January 2, 1989 for the Lorain County Domestic Relations Court as a Court Referee.

3. For the first two years I served as the IV-D Referee, hearing child support matters.

4. In 1981 I became the Juvenile Referee.

5. In 1984 I became the referee hearing domestic matters. On rare occasions between 1984 and my termination by Judge Zieba, I would fill in for either the IV-D referee or the Juvenile Referee.

6. At the time of my termination in 1989, I had more seniority as a referee hearing cases in the Lorain County Domestic Relations Court than any other referee.

7. I was never criticized or reprimanded for any lack of performance on my part. I had received compliments on my performance periodically from Judge Henry T. Webber and also from Judge Henry P. Webber. I made recommendations as to findings of fact and conclusions of law to both judges. I was never told by either judge that my performance as a referee during my entire tenure with the Court before my discharge was anything but satisfactory.

8. During my 10 years as a referee with the Lorain County Domestic Relations Court, my job duties were to hear testimony and based on that testimony to make recommendations of findings of fact and conclusions of law to Judge Henry T. Webber and Judge Henry P. Webber. My job duties were governed exclusively by Ohio Rules of Civil Procedure 53, 75 and 40. I had no authority over other Court referees.

9. I had no policy making or confidential duties and had no responsibilities with respect to the overall operation of the Lorain County Common Pleas Court, Domestic Relations Division.

10. My job did not require partisan political party affiliation or party loyalty and was limited strictly by Ohio Rules of Civil Procedure 53, 75 and 40.

11. I had no authority to determine how the administration of the Court was run. I did not handle sensitive or confidential information as it related to Court policy or the running of the Court.

12. I did not have day to day, face to face, constant contact with either Judge Henry T. Webber or Judge Henry P. Webber. I did not perform my daily duties in the immediate work environment of Judges Henry T. and Henry P. Webber. I would see them on the average of five to ten minutes per week in my capacity as a referee. That contact was typically either for me to gain direction or advice on how the court wanted a particular case to be handled. On rare occasions [5 to 10 times in the ten years] the Court would ask me to do legal research on a case. I would prepare a memorandum on what my research revealed as to the law on that issue. On those occasions, I would merely prepare a memorandum and turn it in to the Court.

13. I am a registered Democrat and I have been active in Lorain County Democratic political activities since 1976. I am a precinct committee person for the Democratic Party in Lorain County and was a former Ward Leader for Ward 1 in Loran County.

14. I supported Judge Henry T. Webber, during the Democratic Primary and the non-partisan General Election in 1988. Democratic Incumbent Judge Webber opposed

Republican Joseph C. Zieba in the non-partisan General Election in November of 1988.

15. During that campaign, Joseph Zieba told me "don't get caught in the cross-fire".

16. On election day, in early November, 1988, Joseph Zieba saw me handing out literature for Democrat Henry T. Webber.

17. After almost 10 years of faithful service to Defendant Lorain County Domestic Relations Court, I was terminated from my full-time position as Court Referee for Lorain County Domestic Relations Court. I was informed of this termination on or about December 23, 1988, via a certified letter mailed to me on December 22, 1988, via a certified letter mailed to me on December 22, 1988 by Judge-Elect Joseph C. Zieba, which stated in its entirety "Please be advised that my term of office as Judge, Lorain County Domestic Relations Court, commences on Tuesday, January 3, 1989. I wish to advise you that you will not be retained and your services will not be required at that time." I was never informed by Joseph Zieba that my termination related to poor job performance. I was never asked to submit a resume by Joseph Zieba in order to retain my position as Lorain County Domestic Relations Court referee.

FURTHER, AFFIANT SAYETH NAUGHT.

/s/ David M. Mumford
DAVID M. MUMFORD

SWORN TO, AND SUBSCRIBED, BEFORE ME, A NOTARY PUBLIC, THIS 29th DAY OF AUGUST, 1991.

NOTARY PUBLIC

APPENDIX O

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

AFFIDAVIT OF JOSEPH C. ZIEBA

taken August 30, 1991

Pages O-1 thru O-1

STATE OF OHIO)
) SS. AFFIDAVIT
LORAIN COUNTY) **Joseph C. Zieba**

JOSEPH C. ZIEBA, first being duly sworn according to law, deposes and states as follows:

1. That, at all times relevant herein, the Affiant is a registered Republican;

2. That, in November of 1988, the Affiant was elected Judge of the Lorain County, Ohio, Court of Common Please, Domestic Relations Division;

3. That, the Affiant's opponent in the aforementioned election was Henry T. Weber, an incumbent Democrat;

4. That, the Affiant's six year term as one of two Domestic Relations Court Judges commenced on January 3, 1989;

5. That, statements contained in this Affidavit are based upon the Affiant's own personal knowledge and beliefs; and are true as the Affiant verily believes.

/s/ JOSEPH C. ZIEBA

APPENDIX P

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LETTER FROM JOSEPH C. ZIEBA

dated December 22, 1988

Pages P-1 thru P-1

JOSEPH C. ZIEBA
ATTORNEY AT LAW
814 REID AVENUE
LORAIN, OHIO 44052

December 22, 1988

David M. Mumford
1213 Missouri Avenue
Lorain, Ohio 44052

Dear Mr. Mumford:

Please be advised that my term of Office as Judge, Lorain County Domestic Relations Court, commences on Tuesday, January 3, 1989.

I wish to advise you that you will not be retained and your services will not be required at that time.

Sincerely yours,

/s/ Joseph C. Zieba
JUDGE-ELECT JOSEPH C. ZIEBA

JCZ/jam

APPENDIX Q

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LETTER FROM FRANK C. GIAMBOI
TO DAVID A. BASINSKI

dated December 7, 1990

Pages Q-1 thru Q-7

DECEMBER 7, 1990

TO: DAVID A. BASINSKI, ADMINISTRATIVE JUDGE
GERALD STRAIT, HEAD REFEREE

IN REGARDS TO MY PERFORMANCE THROUGHOUT THIS PAST YEAR, I FEEL THAT IT HAS BEEN EXEMPLARY. I HAVE DONE CONSISTENT, QUALITY WORK FOR THIS COURT WITH VERY MINIMAL SUPERVISION. HOWEVER, I REALIZE THAT IT IS EASY TO SING ONE'S OWN PRAISES, BUT TO GET A MORE TRUE AND MORE ACCURATE MEASURE OF ONE'S PERFORMANCE, SOME INPUT MUST COME FROM THOSE PEOPLE WITH WHOM HE MUST WORK.

I AM CONFIDENT THAT IF YOU WERE TO ASK OUR FELLOW ATTORNEYS, THE PROBATION DEPARTMENT, THE JUVENILE SECRETARIAL STAFF, OR EVEN THE PROSECUTOR'S OFFICE, YOU WILL FIND THAT ALL ARE TREATED WITH THE UTMOST RESPECT AND CONSIDERATION. SUCH A TASK IS NOT A SIMPLE ONE, BUT ONE THAT REQUIRES A GREAT AMOUNT OF DIPLOMACY, GIVEN THE DIVERSE INTEREST OF EACH CONCERNED PARTY.

HOWEVER, IT HAS BEEN BROUGHT TO MY ATTENTION, BY REFEREE GERALD STRAIT DURING

MY EVALUATION, THAT THERE MAY HAVE BEEN ONE OR TWO OCCASIONS WHERE SOMEONE MAY HAVE PERCEIVED THAT I DID NOT TREAT THEM AS THEY BELIEVED THAT THEY SHOULD HAVE BEEN TREATED. WHEN I INQUIRED AS TO WHERE OR FROM WHOM THESE ISOLATED COMPLAINTS MAY HAVE INITIATED, THAT INFORMATION WAS NOT DIVULGED. I WILL NOT DENY THAT SOMEONE MAY HAVE MISPERCEIVED OR MIS-INTERPRETED MY ACTIONS, HOWEVER, I CAN NOT ACCURATELY RESPOND TO BLANKET OR VAGUE COMMENTS OR COMPLAINTS. I WOULD BE HAPPY TO ADDRESS ANY SPECIFIC INSTANCE. I THINK IT IS UNFAIR THAT ANY SPECIFIC COMPLAINT IS NOT BROUGHT TO MY IMMEDIATE ATTENTION. I CERTAINLY REGRET ANY ACTION WHICH REFLECT BADLY ON THIS COURT. THE JUVENILE COURT HAS CERTAINLY BEEN THROUGH A TUMULTUOUS YEAR, WITH THE REALIGNMENT OF PERSONNEL, THE ACQUISITION OF FOUR NEW PROBATION OFFICERS, AND THE STAGGERING AMOUNT OF JUVENILE DELINQUENCIES AND THEIR ACCOM-PANYING ARRAIGNMENTS, PRETRIALS AND TRIALS. IF I HAVE EVER INADVERTENTLY OFFENDED ANYONE THIS YEAR, I TRULY REGRET IT, BUT I CAN THINK OF ONLY TWO TYPES OF SITUATIONS WHICH COULD HAVE GIVEN RISE TO THOSE SITUATIONS, TO WIT:

1. AN ATTORNEY TRYING TO TAKE ADVANTAGE OF THIS COURT OR ITS PERSONNEL OR SHOWING DISRESPECT FOR THIS COURT OR ITS PERSONNEL OR TRYING TO TAKE ADVANTAGE OF THE ACCOMMODATING NATURE OF THIS COURT AND ITS PERSONNEL; AND
2. THE SAME MISTAKE BEING MADE OVER AND OVER AND OVER AGAIN BY MEMBERS OF THE PROBATION DEPARTMENT OR OTHER JUVENILE COURT PERSONNEL.

IT IS EXTREMELY FRUSTRATING TO ENCOUNTER A PROBLEM AND HAVE NO POWER TO RECTIFY IT. I BLAME NO ONE FOR THIS SITUATION. I REALIZE THAT WE ARE ALL TRYING TO MAKE CHANGES IN A SYSTEM WHERE CHANGE IS ALMOST ALWAYS MET WITH INITIAL RESISTANCE, AND THAT CHANGES COME AT A RAPID PACE WITH THE PASSAGE AND RATIFICATION OF EACH NEW LAW.

THE POSITION OF JUDGE OR REFEREE IS A POSITION THAT WHEN AUTHORITY IS EXERCISED, SOMEONE WILL USUALLY ALWAYS BE DISCONTENTED. ONE PARTY WILL WANT YOUR "HEAD ON A PLATTER", WHILE THE OTHER PARTY MAY BE READY TO NOMINATE YOU FOR SAINTHOOD. I UNDERSTAND, AND EXPECT, AS I AM SURE YOU DO, A COUPLE OF COMPLAINTS

DURING THE YEAR. I WOULD LIKE TO EXPERIENCE AND WILL TRY TO WORK TOWARDS NO COMPLAINTS, BUT I THINK THAT A COUPLE OF COMPLAINTS PER YEAR WHEN ONE HANDLES THOUSANDS OF CASES IS A VERY GOOD RATIO.

AGAIN, I WOULD APOLOGIZE FOR ANY ACTION ON MY PART THAT MAY HAVE BEEN PERCEIVED AS NOT GIVING ANY PERSON THE RESPECT AND CONSIDERATION THEY DESERVE.

I HAVE BOTH INSTITUTED HELPFUL PROGRAMS OF MY OWN AND FOLLOWED THE DIRECTIVES OF THE ADMINISTRATIVE JUDGE, AND HIS STAFF, THIS YEAR AND LAST, REGARDLESS OF MY AGREEMENT WITH SUCH POLICIES OR MY LACK OF INPUT INTO THEIR FORMATION OR IMPLEMENTATION.

MY CONCERN AND DISAPPOINTMENT IS THAT I WAS ALIENATED FROM A GREAT MAJORITY OF ALL MEETINGS DURING THE PAST YEAR. DEPARTMENT HEADS AND SUPERVISORY PERSONNEL BOTH ABOVE AND BELOW ME WERE INVOLVED IN MEETINGS AND POLICY DECISIONS TO WHICH I HAD NEITHER NOTICE NOR INPUT. DECISIONS WERE MADE, PROGRAMS DISCUSSED, CHANGED AND ULTIMATELY IMPLEMENTED

WITHOUT ANYONE INFORMING ME OF WHAT WAS DISCUSSED, DECIDED, CHANGED OR IMPLEMENTED. I, AS A JUVENILE REFEREE, HAD NOT EVEN BEEN EXTENDED THE COURTESY OF AN INVITATION TO MEETINGS THAT GAVE RISE TO THOSE POLICY, PROGRAM AND PROBATION DEPARTMENT DECISIONS. IT IS EMBARRASSING TO BE EXCLUDED AND KEPT IN THE DARK AND TO HAVE PROBATION DEPARTMENT PERSONNEL ADVISE AND EXPLAIN PROGRAMS REGARDING JUVENILE COURT OPERATION TO THE REFEREE. I FEEL THAT AS A JUVENILE REFEREE, WHO HANDLES THE MAJORITY OF JUVENILE CASES, I SHOULD BE INFORMED OF AND INVITED TO MEETINGS THAT WILL CONCERN THE DAY TO DAY OPERATIONS OF THE JUVENILE COURT.

I, BETTER THAN ANYONE, KNOW THE PROBLEMS OF JUVENILE COURT, BECAUSE ALL OF THOSE PROBLEMS EVENTUALLY COME TO ME DURING THE COURSE OF THE JUVENILE PROCESS. I CAN IDENTIFY THE PROBLEMS AND TAKE STEPS TO RECTIFY THE SITUATION, BUT BECAUSE I WAS NOT PRIVY TO THE MEETINGS, I AM NOT CONSULTED WITH OR LISTENED TO, WHICH AMOUNTED TO A WASTE OF RESOURCES AND HELPFUL IDEAS.

I DO NOT KNOW HOW THIS SITUATION CAME ABOUT, I JUST TRULY WISH THAT I WOULD HAVE BEEN EXTENDED AN INVITATION TO HELP EVERYONE THIS YEAR. I AM CONFIDENT THAT MY INPUT WOULD HAVE SOLVED SOME OF THE GLARING PROBLEMS IN THE JUVENILE COURT PROCESS.

THE PROBLEMS IN JUVENILE ARE LENGTHY, BUT NOT OVERWHELMING.

IF I DID NOT CARE ABOUT THE COURT OR IT'S IMPROVED EFFICIENCY AND OPERATION, THIS SITUATION WOULD NOT BOTHER ME AS IT DOES, BUT I DO CARE, AND YES, I AM IDEALISTIC, AND YES, I DO BELIEVE I COULD HAVE OR COULD HAVE AT LEAST HELPED TO MAKE A DIFFERENCE IN THE EFFICIENCY AND PROGRESS OF THIS COURT, AND I WILL CONTINUE TO DO SO.

IN CONCLUSION, I WOULD LIKE TO SAY THAT THIS ADDENDUM TO MY EVALUATION IS LENGTHY ENOUGH, AND I WOULD WELCOME ANY DISCUSSION OF ITS CONTENTS.

PLEASE ACCEPT THESE COMMENTS IN THE TRUE SPIRIT IN WHICH THEY WERE WRITTEN, AS

A PERSONAL, HONEST AND HOPEFULLY HELPFUL INSIGHT INTO THE JUVENILE COURT SITUATION.

RESPECTFULLY SUBMITTED

/s/ Frank C. Giamboi
FRANK C. GIAMBOI
JUVENILE COURT REFEREE

APPENDIX R

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

EXCERPTS OF DEPOSITION OF
DAVID A. BASINSKI

Civil No. 1:90-CV-2243
taken 12/16/94

Pages R-1 thru R-5

Excerpts of Deposition of **David A. Basinski**.

(Deposition taken 12/16/94)

* * * *

[page 8]

A. ...years. With Paul St. Marie, three to four years. And that's it.

Q. How many years were you in private practice, prior to becoming a Judge, altogether?

A. I started private practice in 1966.

Q. Is that the year you became a lawyer?

A. Yes.

Q. So you've either been i private practice, or you've been on the Bench since you became a lawyer?

A. Since 1966.

Q. Before you went to the Domestic Relations Court Bench, what kind of law practice did you have?

A. Primarily, fifth floor or Domestic Relations and juvenile practice... Probably, 70 percent of what I did was that. The rest was trial work, mostly appropriation work for the City of Elyria, and I was a Special Counsel for the City of Elyria, also. Primarily, trial work.

Q. Any you believe that Mr. Mumford's firing was a political firing, correct?

MR. FLANAGAN: Objection.

You may answer.

* * * *

[page 9]

A. Yes.

Q. How many times did you appear in front of David Mumford, when Mr. Mumford was a DR Referee?

A. You asked me that before, and I said at the time in excess of a hundred times. I know that. I can't honestly recall... You have to understand, David was primary Referee hearing temporary orders. Lots of those would be worked out. We would - - if you and I had the - - we might be able to work it out, and when we would go to see David, we would simply tell him what we had worked out, and he would initial or sign the entry and approve it, and then it would be allowed to be processed the rest of the way... Some of those were contested matters obviously, in excess of a hundred times, several times.

Q. How many of the matters were contested, out of the hundred?

A. Oh, I have no idea.

Q. More than 10?

A. That we actually got to hearing, yes, I...

* * * *

[page 11]

A. No... It seemed our areas of practice were different. Yes, I knew who he was. I would speak to him... At that time, he was an Assistant County Prosecutor. My primary dealings with him would be when I would have a criminal matter, and he would be the Prosecutor assigned to that matter.

Q. Did Mike Sherach work on your campaign,...

...when you ran for Judge?

A. No.

Q. Did he work on anybody else's campaign, to your knowledge?

A. Oh, certainly he worked on Judge Zieba's campaign, I would guess that. I would see him with Judge Zieba on his campaign, yes... Mike is a Republican, and I am a Democrat.

Q. Is party affiliation a necessary requirement for the effective performance of a Domestic Relations Court Referee in your Domestic Relations Court?

MR. FLANAGAN: Objection.

You may answer.

* * * *

[page 12]

A. No.

Q. You have administrative duties, as well as judicial, correct?

A. It is different. In the past six years, it would be one year, and then not the next, that is correct.

Q. Depending on whether you are the Administrative Judge or whether Judge Zieba, who is also present today, was the Administrative Judge?

A. That is correct.

Q. What were your administrative duties? You are the Administrative Judge now correct?

A. I am.

Q. In 1995, do you know whether you will be the Administrative Judge?

A. Yes, I will be the Administrative Judge, either by unanimous vote, or I would be senior to the person who is taking Judge Zieba's seat... So in the event she and I - - she would vote for herself, and I would vote for myself, I would be senior to her, and I would be the Administrative Judge in '95.

* * * *

[page 42]

...MR. FLANAGAN: You mean '71.

A. No, '90 - -

MR. FLANAGAN: The exhibit number.

A. Oh, exhibit number is 71, yes.

Q. Was there a grandfather provision in that; in other words - -

A. Yes, sure... Anybody that was working at that time that was related, obviously, we did not terminate anyone for that. Yes, that is true.

Q. So if David Mumford had not been fired by Judge Zieba - -

A. This policy would have had no effect on the fact that his sister works there, and that David works there. It would have no effect.

Q. As a matter of fact, if Judge Zieba would not have fired David Mumford, when you took over the Administrative Judgeship, you wouldn't have fired him,...

...either, would you?

A. I didn't intend to fire anybody. I wanted to observe people's work and make my own evaluation...

* * * *

[page 43]

...I'm not saying I would have kept David, but I did not go in with the idea to terminate anyone.

Q. Including David Mumford?

A. Including David Mumford.

Q. Do you recognize the name Charlene Brown?

A. Please - - I'm sorry. I have, at one time we had 215, now we are down to 163.

Q. child care worker?

A. That could very well be. I'm unaware - -

Q. Part-time at the Detention Home?

A. That could - -

Q. Do you know whether she was hired by Judge Zieba or yourself?

A. I don't recall hiring her.

MR. NIERMANN: Why don't we go off the record. Someone is knocking at the door.

- - -

(Thereupon, a brief recess was taken.)

- - -

A. I believe, it is a Judge Zieba hire. I don't recall, but whatever the year would give you some indication.

APPENDIX S

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

EXCERPTS OF DEPOSITION OF
DAVID A. BASINSKI

Civil No. 1:90-CV-2243
taken 4/27/91

Pages S-1 thru S-19

Excerpts of Deposition of **David A. Basinski**.

(Deposition taken 4/27/91)

* * * *

[page 4]

CROSS-EXAMINATION

BY MR. NIERMANN:

Q. Your Honor, please state your name for the record.

A. David A. Basinski, B-a-s-i-n-s-k-i. There is a David A. Basinski also. He is a junior, however, I do not use senior.

Q. Your residence address?

A. 133 Columbus Street, Elyria, Ohio, 44035.

Q. Judge, prior to your election to the bench, you practiced law, correct?

A. Yes.

Q. You took depositions?

A. Yes.

Q. What I'm about to say will be redundant. It is getting redundant, but I have to...

* * * *

[page 5]

...get these instructions at the beginning of every deposition. I will try to keep them short.

Yes's and no's for affirmative and negative rather than gestures. All of us lapse into it. I probably will try to remind ourselves not to do that.

Secondly, if there is a questions that I ask you and you don't understand it, please don't answer it, but ask me to clarify it instead.

We won't want your testimony, when it is transcribed, to be other than testimony that you have intended.

A. Surely. Yes.

Q. Judge, are decisions to hire made by you as the administrative judge of Lorain County Domestic Relations Court based upon merit and performance?

A. When I am the administrative judge, how do I go about hiring?

Q. Yes. Are your decisions based to hire based upon merit or performance?

MR. FLANAGAN: Objection.

You may answer.

WITNESS: Yes...

* * * *

[page 13]

...true, but yes. That was not the main reason I didn't rehire Dave. It was because I was trying to build a coalition.

Q. With Judge Zieba?

A. Yes. I did not rehire anyone that Judge Zieba terminated.

Q. Now, since Judge Zieba terminated Jack McCrea, have your feelings about that changed?

A. As to building a coalition?

Q. Yes.

A. Obviously, I was unsuccessful when he fires your court administrator.

Q. He brought Joyce Motsch in who was his court administrator, correct?

A. Yes.

Q. But when Jack McCrea was court administrator and you were administrative judge, you didn't terminate Joyce Motsch?

A. I did not.

Q. That's different between the way --

A. Well, Judge Zieba has fired thirty-one people

since he became administrative judge. I fired one as a result of an investigation at the detention home. That person was subsequently...

* * * *

[page 14]

...indicted by the grand jury and plead out and it as a discharge. I fired one.

Q. You would presume that discharge was for cause?

A. I went and talked to Judge Zieba and told him I was going to discharge that person and did in fact. I believe he was in agreement with that discharge.

Q. Before Judge Zieba took office, all the people he sent letters out to telling them that their services were no longer required, those were all Democrats?

MR. FLANAGAN: Objection.

You may answer.

WITNESS: I presume they were, yes. I did not want Judge Zieba to fire any one. I told him that.

BY MR. NIERMANN:

Q. I think my client would agree with you along those lines.

A. I wrote to him and told him that.

Q. Since this coalition has broken down, your attitude has changed?

MR. FLANAGAN: Objection.

You may answer.

* * * *

[page 16]

...has authorized me to communicate to you that he is interested in such a position when you become administrative judge.

MR. FLANAGAN: Objection. I move to strike

that. It is not a question to the witness.

MR. NIERMANN: It is a communication of information on the record. Thank you.

BY MR. NIERMANN:

Q. When you say you would consider Mr. Mumford for employment as domestic relations court referee should a position open when you become administrative judge, what do you mean by that.

MR. FLANAGAN: Objection.

You may answer.

WITNESS: I would consider his application along with everyone else that would apply.

BY MR. NIERMANN:

Q. Is it your testimony then that if Judge Zieba had not fired or terminated David Mumford that you would have kept him?

A. Yes. I think I ought to qualify that in one way to you, Dennis. I am not sure I...

* * * *

[page 17]

...would have kept him as chief referee, but I certainly would not have terminated him.

Q. Maybe not the chief?

A. Yes. You have to understand, I would have kept anybody. I wouldn't have made any cuts.

Q. Had you practiced in front of David Mumford when he was a referee and you were practicing domestic relations?

A. Yes.

Q. Sometime between election day and your taking office, did you ever contest a hearing in front of David Mumford?

A. I can't remember. If you give me a name or fill

me in, because I can't remember that. I very well could have, but I don't remember.

Q. I am trying to refresh your recollection. Do you recall Dave Mumford having taken you into his office and indicating he was desirous in staying with the court after you took office?

A. That very well could have been, yes. That very well could have been. I don't recall it specifically, but yes, that very well could have happened.

* * * *

[page 20]

...court. I simply took the vantage of the people that were here and used them.

I didn't bring anybody in to be the new court administrator. I took advantage of an employee that had been with the court twenty-six or twenty-seven years and asked him to be the court administrator.

BY MR. NIERMANN:

Q. Who did you consider to be your close personal staff?

MR. FLANAGAN: Objection.

You may answer.

WITNESS: I think the judge's personal staff is defined by the manual as your bailiff, court reporter, and your executive assistant or secretary. That's the way they are defined.

Who else do I feel? Obviously, the court administrator last year, assistant court administrator. I felt this Glasow fellow. Court administrator being McCrea and Jerry Strait the chief referee. Those would be the people I was tight with.

Now, if I called a staff meeting, we would have twenty-six or twenty-seven people...

* * * *

[page 25]

A. No.

Q. Have you ever known him to be immature or childish in the term of his duty?

A. Have I known that?

Q. Yes.

A. No.

Q. Did you ever know David Mumford to have temper tantrums while performing duties as a DR referee?

A. No.

Q. You worked with Jerry Strait while he was in your private law office and then before you took the bench here? Judge Webber hired Jerry back, right?

A. Yes.

Q. After the election but before you and Judge Zieba took the bench, did you talk to Judge Zieba about retaining Jerry Strait?

MR. FLANAGAN: Objection.

You may answer.

WITNESS: Yes, I did. I only met with Judge Zieba once before the election, after the election, and on November 18.

* * * *

[page 26]

BY MR. NIERMANN:

Q. Where did you meet?

A. It has changed hands now. I called and asked for the meeting. It was a little restaurant on Route 57 between Elyria and Lorain but closer to Elyria.

It use to be the Old Howard Johnson's right across from a Shell gas station on 57. That's where he and I met.

Q. When was the discussion in relation to Jerry Strait?

MR. FLANAGAN: Objection

You may answer.

WITNESS: I pitched very hard for Jerry at that particular meeting. I had no idea of what Joe intended to do.

As I recall, Joe came in with a list of all the court employees and he asked me to evaluate them.

I said I couldn't do that. A lot of them I didn't know, and I certainly didn't know their work product.

At that time I encouraged him to retain them all.

* * * *

[page 27]

BY MR. NIERMANN:

Q. Did he ask you specifically about each one or all in general?

A. No. He had the entire list. A lot of them I didn't know. I would have no contact with them.

Q. He didn't say, "What about Jerry Strait" or "What about Dave Mumford," to your recollection?

A. I can't remember that.

Q. Either way, right?

A. I can't remember that.

Q. What did you tell him about Jerry Strait?

MR. FLANAGAN: Objection.

WITNESS: Well, again, I have to preface all this with my intimate knowledge and friendship with Jerry Strait. I knew Jerry better than any court employee at that time. I knew he had four children, that it was tight for him, and I didn't want him being without a job. It is as simple as that.

BY MR. NIERMANN:

Q. At that meeting did Judge Zieba tell...

* * * *

[page 28]

...you he would retain him?

A. He told me to have Jerry get in tough with him. In fact, when I got back from the meeting -- it was on a Friday. It was November 18. I know that.

Q. Of '88 right?

A. Of '88, yes. I asked him then to call Judge Zieba, and I believe he met with him, but I am not sure.

Q. It was at that meeting that Judge Zieba told Jerry he was going to retain him, to your understanding?

MR. FLANAGAN: Objection.

WITNESS: I assume. He did retain him, so I don't know.

BY MR. NIERMANN:

Q. Now, you had no discussion with Judge Elect Zieba at that time about David Mumford, did you?

A. I don;t recall that. I am not saying I didn't. I don't recall.

He gave me the list. He had a computer list from somewhere. He must have gotten it from the auditor. It was listing all the employees.

* * * *

[page 31]

MR. FLANAGAN: Objection.

BY MR. NIERMANN:

Q. Is it irrelevant?

A. Yes. I just want the fellow to produce, or she, sure.

Q. We have received two different manuals in request for documents in this case, and one of them is a manual -- correct me if I'm wrong -- from what I have learned to this point in time --

There are two manuals that the Domestic Relations Court in Lorain County uses depending upon who is the administrative judge at any given time, is that a fair

statement?

A. It would appear so, yes.

(Deposition Exhibit 24 was marked for identification and entered into the record)

Q. I am going to hand you what has been marked as Exhibit Number 24. You can look through it and see if it appears to be the manual.

A. Yes. I would guess it probably is, yes.

Q. As we go through it if at any point you determine it is not, you will tell me?

A. Yes. I presume it is.

* * * *

[page 43]

Q. Right. Is that the only factor that puts him in that category?

A. No.

Q. What else puts him in the category?

A. I have confidence in his judgement. I know him. I appreciate his judgement.

Q. That's because, as you said earlier -

A. Longtime personal relationship.

Q. Not because of anything --

A. Not because he is necessarily the chief referee. Perhaps he is the chief referee because of all those other thins too. I am not trying to mess you up. That's the way I feel about it.

Q. Page 1 of Exhibit 24, the first page with a number on it says "to all employees" on the top?

A. Yes.

Q. I think the third full sentence of the first paragraph indicates the manual applies to all employees?

A. Yes.

Q. Except the judge's staff, which includes bailiff, judge's secretary, judge's court...

* * * *

[page 44]

...reporter, and it goes on to say judge's staff works at the pleasure of the particular judge, whereas all other employees at the pleasure of the administrative judge, correct?

A. Yes.

Q. Does that mean this manual applies to domestic relations court referees?

MR. FLANAGAN: Objection.

WITNESS: Yes. It is my interpretation it does, yes.

BY MR. NIERMANN:

Q. However, on a day-to-day basis do you see your secretary, personal secretary?

MR. FLANAGAN: Objection.

WITNESS: Constantly. She is right outside my desk.

BY MR. NIERMANN:

Q. That would be true for the court...

* * * *

[page 45]

...reporter?

A. Yes.

MR. FLANAGAN: Objection.

BY MR. NIERMANN:

Q. Is that as true for domestic relations court referees?

A. No. There are days I don't see them.

Q. That would include the chief as well as the others?

A. I would see Jerry every day he is here.

Q. Every day?

A. Yes. His office is just down from mine. He uses my coffee pot plus I have the Plain Dealer sports page there and he would stop by to read that every morning.

Q. Would you see him as you just described it, or do you have --

A. Just as that. I would not discuss something with him everyday, no.

* * * *

[page 48]

A. Yes, that's what it says.

Q. Is that in fact correct, to your knowledge? Is that the way it has gone since your election?

MR. FLANAGAN: Objection.

WITNESS: Remember, this did not go into effect until June 1, and I guess it went out January 4 of this year. As far as I know, yes, that's true.

BY MR. NIERMANN:

Q. We are going to stay with this for awhile, with the manual. Page 6, Section 101 2 says "Supervision in lines of authority."

A. Yes.

Q. Would you read that section, and after you read it tell me whether referees fit in. In other words, including Mr. Strait who supervises the referees?

MR. FLANAGAN: Objection.

WITNESS: Certainly and obviously the administrative judge. All referees work for two judges here in that they handle each of our cases. They are drawn by lottery, and it could be my case or Joe's case.

* * * *

[page 50]

...think the judge would want me to do with this"?

Q. That's because he has more experience?

A. Yes. Of the referees that are here now, he is by far the most experienced. I don't know how he would stack up with David at that time that he was here. I don't know that. I believe Jerry was here before David, but I don't know that.

Q. On the top of Page 6 it says that the court shall recruit, select, promote, and transfer employees on the basis of qualifications without in regard to race, color, creed, national origin, sex, age, handicap, or other non-merit factors except that it retains the right to establish bona fide qualifications based on sex or age.

Is that policy followed to your knowledge?

MR. FLANAGAN: Objection.

WITNESS: I think it is. If it hasn't, I am not aware of that.

BY MR. NIERMANN:

Q. Is it true that party affiliation would be a non-merit factor as it relates to the...

* * * *

[page 62]

...terminate David though.

BY MR. NIERMANN:

Q. I understand that.

A. In fact, I encouraged Judge Zieba to keep all employees.

Q. We are definitely in agreement. What are the duties of a domestic relations court referee as you observed them being performed since you have taken office?

A. They would handle all temporary orders. They would handle all post-decree orders other than a change of custody.

They would fill in, when necessary, in both the juvenile docket and the children services docket.

Q. Is that IV D?

A. I don't know that any of them have ever gone to IV D. I don't know that. They very well have.

I am thinking if somebody called in sick and we had people for hearings they might switch down to handling something like that. They would handle our Senate Bill '89 hearings, children services when Jerry Strait would not be available to do that, because Jerry primarily...

* * * *

[page 64]

...handles Senate Bill '89 stuff. Basically, that's their duties.

Q. If you can rank by time spent in your chambers discussing work related items with you, who would be the person who would be in your chambers discussing work related items with you the most?

MR. FLANAGAN: Of the referees?

BY MR. NIERMANN:

Q. Any employees.

A. We are excluding perso ıal staff?

Q. No. Including.

A. The one I would deal the most with would be my bailiff.

Q. If you can, just go down the list.

A. This obviously would vary to whether or not I was the administrative judge or not.

Q. Let's start out with --

A. Do you understand what I am saying?

Q. Sure. Let's start out with when you are not the administrative judge.

A. The bailiff primarily and my secretary next. It would probably be Tim Glasow next and then Jerry Strait.

* * * *

[page 65]

Q. Beyond them going down the list.

A. I am not sure. We are kind of getting into a mish-mash, but I would guess probably after those perhaps of late Francis Carde since he has taken over as the juvenile court referee, and beyond that would probably be the chief probation officer of the supervisors in the probation department.

Q. How often with Mr. Musson and Mr. Balunek?

A. Very rarely.

Q. Is there any reason why it is very rarely with them and that you did mention Mr. Carde?

A. Oh yes. Francis might have some particular case that he wants to explain to me.

Q. A certain thing?

A. Yes.

Q. Is there reason --

A. A lot of what your DR referees do is routine kind of thing. For example, the child support order now determined by guidelines. So, they don't have much discretion in what they are going to do.

Q. How about when you are...

* * * *

[page 66]

...administrative judge?

A. Probably then after my bailiff and secretary the next person would be the court administrator who I am sure I met daily with.

Q. Do you know why David Mumford was fired by Judge Zieba?

MR. FLANAGAN: Objection.

You may answer.

WITNESS: Do I know?

BY MR. NIERMANN:

Q. Yes.

A. I do not know.

Q. Do you have a belief? If so, while you are explaining what the belief is, explain what it is based on.

MR. FLANAGAN: Objection.

You may answer.

WITNESS: I think it was a political decision by Judge Zieba.

* * * *

[page 67]

BY MR. NIERMANN:

Q. What do you base that opinion on?

MR. FLANAGAN: Objection.

You may answer.

WITNESS: I am going too fast for Bob.

MR. NIERMANN: You are not the only witness that goes too fast.

WITNESS: I think Judge Zieba had an opportunity -- and this is very personal and is not based on anything he and I discussed -- he fought me on the administrative judgeship as to why he would do that, and he felt going into this that he would be the administrative judge for the whole six years and that he would have opportunity to establish what he perceived to be some sort of empire. It was his opportunity.

The people that he chose to terminate, I certainly don't believe he had any idea as to their qualifications, abilities, work product, or any of those sorts of things.

He chose people that he believed...

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[page 68]

...were close to the Webber Administration.

BY MR. NIERMANN:

Q. You mean to fire?

MR. FLANAGAN: Objection.

WITNESS: Yes.

BY MR. NIERMANN:

Q. If Jerry Strait had been doing domestic relations work instead of Senate Bill '89 cases, would he have been in your office as much?

MR. FLANAGAN: Objection.

You may answer.

WITNESS: Perhaps you misconstrued my answer. He was in the office not so much primarily because he did Senate Bill '89 stuff as he was the supervisor of the referees.

BY MR. NIERMANN:

Q. Right.

A. So, it would be more than that. You are probably right. Number one, '89 was a brand new area. We were trying to work our way through it, so I guess if he were the chief referee and doing DR instead of '89, would he have been there as frequently as he was? Probably not.

Q. Even in the supervisory capacity, in ...

* * * *

[page 69]

...his supervisory capacity on supervisory matters, how often would he be in your chambers on any given week on the average?

Of course, that only applies while -- does that apply while you are administrative as well as when you are not administrative?

A. No. Jerry would come to see me, I guess, if it were my case, "What do you want me to do?"

Q. Let's say timewise per week how many hours, minutes, or whatever?

A. I am just guessing. I haven't thought of it in this context, but I would guess perhaps he comes and we discuss something official twice a week.

Q. For how long?

A. Ten or fifteen minutes maybe.

Q. Each time?

A. Yes. It is tough for me to pin down. I hadn't thought of it.

Q. That's your best estimate?

A. Sure. Yes.

Q. You become administrative judge January 4, 1992?

A. Correct. Judge Zieba had it for...

* * * *

[page 70]

...fourteen weeks.

Q. If during the period between January 4, 1992 and January 3, 1993, a judgement were rendered in this case ordering Mr. Mumford to be reinstated as domestic relations court referee, would you follow that order?

MR. FLANAGAN: Objection.

You may answer.

WITNESS: Would I follow a court order?

BY MR. NIERMANN:

Q. Yes.

A. I don't think I have any choice.

Q. It wouldn't make any difference that you weren't named a defendant insofar as your following a court order from Judge Krenzler to reinstate him?

MR. FLANAGAN: Objection.

WITNESS: Yes, I would follow the court's order.

MR. NIERMANN: No further questions. Do either of the other counsel have questions?

MR. FLANAGAN: Just a few questions.

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[page 71]

DIRECT EXAMINATION

BY MR. FLANAGAN:

Q. Judge Basinski, you testified previously today that in your opinion the termination of Mr. Mumford was political in nature, is that correct?

A. Yes.

Q. Prior to indicating that the termination was political in nature, you did specifically indicate that you had no first hand personal knowledge as to why Judge Zieba terminated Mr. Mumford, is that correct?

A. Yes.

Q. Your opinion as to the political termination is your own belief, is that correct?

A. Yes.

Q. Although you have testified that it is your belief that Mr. Mumford's terminations is political in nature, are you in a position to express an opinion as to whether or not the termination was constitutional or unconstitutional?

A. I don't know whether it was or wasn't.

* * * *

[page 79]

A. It is my opinion when you are the administrative judge that all the employees serve at the discretion of that administrative judge, and I believe that he can do whatever he chooses to do as terminating people.

Q. You don't believe that that power as administrative judge would entitle the administrative judge of this court of domestic relations court to supersede federal law or constitutional law?

A. Of course not.

MR. NIERMANN: I have nothing further.

MR. FLANAGAN: I have no further questions.
WITNESS: I will waive signature.
MR. NIERMANN: I appreciate it.
(The deposition concluded at 12:00 p.m.)

APPENDIX T

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

EXCERPTS OF DEPOSITION OF
ADELBERT BALUNEK

dated March 22, 1991

Pages T-1 thru T-9

Excerpts of Deposition of **Adelbert Balunek**.

(Deposition taken 3/22/91)

* * * *

[page 11]

A. Probably since I first registered. '54.

Q. Have you ever been a precinct captain, Republican precinct captain?

A. No.

Q. Ward leader?

A. No.

Q. Hold any position in the Republican party at all?

A. No. None.

Q. Have you worked on any Republican campaigns within the last ten years?

A. I have not worked as such. I have gone to Democratic and Republican fund raisers.

Q. Which Republican fund raisers have you gone to within the last five years?

A. In the last five years most of the Republican fund raisers, and for that matter probably most of the Democratic fund raisers too.

Q. My question is limited to Republican.

A. I have gone to quite a number.

Q. Any for Judge Zieba?

A. Yes.

* * * *

[page 12]

Q. Any for Judge Webber?

A. In the last ten years, yes.

Q. In the last five?

A. Perhaps.

Q. In the last three?

A. You mean three years from now or three years from --

Q. Let's say within the two years prior to you being hired for the position you now hold?

A. I might have been.

Q. Within the year prior to your being hired?

A. I doubt it, but I had met him at other Democratic functions.

Q. What were you told the job would be -- by the way, that job is domestic relations court referee, correct?

A. That is correct.

Q. Is it a full time job or part time job?

A. The job is a full time job, but I have it on a part time basis.

Q. Can you explain what you mean by that a little bit more?

* * * *

[page 13]

A. Well, I work on Monday, Tuesday, and Wednesday mornings. I work Wednesday through 1:00. So, it is a part time job.

Q. Who else performs the duties of domestic relations court referee for Lorain County Common Pleas Court?

A. John Musson is the one who then follows me later in the week. He does it on Wednesday afternoon, Thursdays, and Friday.

Q. I see. Prior to yourself and Mr. Musson taking your positions in the positions you now hold that you have just described, who did the work you did prior to your coming on?

A. Who did the domestic relations job?

Q. Yes.

A. David Mumford.

Q. So, David Mumford did the work that you and Mr. Musson are doing now?

A. He had the job full time, yes.

Q. The job that you and Mr. Musson are now occupying part time?

A. Yes.

Q. So, between you and Mr. Musson, you two part time positions are doing what Mr....

* * * *

[page 14]

...Mumford did full time; is that a fair statement?

A. Sure, the two of us, yes.

Q. Who are you represented by today?

A. Mr. Flanagan, Robert Flanagan.

Q. Not by Pamela Theodotou?

A. I just met Pamela Theodotou.

Q. That's a no, right?

A. Not at this time.

Q. Aside from Mr. Flanagan have you discussed your testimony regarding this deposition with anyone aside from Mr. Flanagan?

A. No.

Q. Will you describe a typical day that you spend as a court referee in the job you now hold?

A. Okay.

Q. Give me as much detail as you can. What I am looking for is not minute detail but a clear understanding of what the normal routine is and what you job duties are.

A. The day starts at 8:30. There will be a schedule posted of temporary hearings. Now, that's what I handle, and that's what this job is basical'y is temporary hearing and certain hearings which are post decree.

* * * *

[page 15]

Q. What percentage of your time do you spend there?

A. What percentage of what time?

Q. The time when you work here at this job? What percentage of the time do you spend in the small cubby hole?

A. One hundred percent unless I go out and go down to see the judge, but on the fifth floor.

Q. What percentage of the time are you seeing the judge by comparison to what percentage of the time you are in the cubby hole?

A. That's difficult for me. I can't tell you. Sometimes the judges would call me an as me: Why did you do this?

Q. How often does that happen in a given week?

A. I can't say. Probably at least once or twice a week.

Q. Once or twice a week?

A. Each judge, yes.

Q. How many hours do you spend here a week?

A. Twenty to twenty-four. Sometimes even thirty.

* * * *

[page 16]

Q. Let's say our of a thirty-hour week, what percentage of your time do you spend in conferences one or two times a week when the judge calls you?

MR. FLANAGAN: I am going to object. The witness has indicated that was difficult and he really couldn't answer. Go ahead and try to answer his question.

WITNESS: Maybe a couple of hours.

BY MR. NIERMANN:

Q. Two hours out of thirty at the most?

A. Maybe three hours.

Q. During the three hours, what's discussed? What's the general nature of the discussion? I don't want to know the particulars. What's the general nature of the

discussion?

A. I can't recall any. I already told you it is new things that are coming up, how are we going to handle certain things, what about the lay offs at Ford, working one week and not working another week, are we going to immediately accept everything for modification and things like that.

* * * *

Q. Even as a Democrat. The record can reflect that Dennis Niermann is a Democrat. That's why I say that.

A. Or socialist or libertarian for that matter. No, I cannot make basis of politics.

Q. Does you job entail any political duties?

A. No, sir.

Q. Do you ever process any confidential or political materials for Judge Zieba?

A. I think.

Q. In the performance of your duties?

A. You mean like tickets to go to fund raisers or something?

Q. No.

A. No, I am not a member of the Republican hierarchy, so I don't process any Republican papers.

Q. You don't do any political work as part of your job duties?

A. No.

Q. Do you ever meet with Judge Zieba or other Republicans on political matters as part...

* * * *

...of your job duties?

A. No.

Q. Do you attend any political or private meetings with Judge Zieba as part of your job duties as court referee?

A. Please read that question again.

Q. Do you attend political or private meetings with Judge Zieba as par of your duties as court referee?

A. It is a two-face question. I do attend private meetings with him concerning my job, yes.

Q. Are these the ones you discussed earlier?

A. Yes.

Q. The two or three hours a week?

A. Yes.

Q. Who is your immediate supervisor?

A. My immediate supervisor is Judge Zieba and Judge Basinski.

Q. How about Joyce Motsch? Does she supervise you in any way?

A. I get no supervision from her.

Q. Does Judge Zieba give you access to any of his sensitive file?

* * * *

A. I don;t know if Judge Zieba has sensitive files.

Q. The answer would be no?

A. No.

MR. FLANAGAN: Objection.

BY MR. NIERMANN:

Q. Do you consider your position to be a policy-making position?

MR. FLANAGAN: Objection.

WITNESS: I feel it is up there giving direction to the rest of the personnel. I feel I am like the alter ego of the judges.

BY MR. NIERMANN:

Q. What policies do you make?

A. I follow the policies of the judges.

Q. Do you make any policies yourself?

A. No, sir. I have input to policy.

Q. Give me an example.

A. Just as I discussed.

Q. You mean about following the new statutes as they are enacted?

A. Yes.

* * * *

Q. Now, do you advise the judge on what the law is, or do you make recommendations that the judge has a right to accept or reject?

A. In my daily function, the later, that is recommendations. The former would be getting back to discussion of law.

Q. On how to follow the law?

A. Yes.

Q. Do you formulate any plans for the implementation of the court's broad goals?

A. The court is divided into domestic relations and juvenile. It is a very large area. Perhaps revising forms. Along those lines, yes, but as far as employment or funding or other matters like that, no.

Q. This goes to a question that you answered earlier, but I want to develop it a little bit further.

Isn't it a fact that if you were to be required as part of your tenure as domestic relations court referee to be dependent on partisan political beliefs that that would undermine it rather than promote the effective performance of your job?

MR. FLANAGAN: Objection.

* * * *

BY MR. NIERMANN:

Q. Any political beliefs that you hold are not related to the effective performance of your job as a domestic relations court referee; is that a fair statement?

MR. FLANAGAN: Objection.

WITNESS: I can't answer that, because

the decisions are made in my mind on the basis of what I perceive through the evidence. It has nothing to do with political belief.

BY MR. NIERMANN:

Q. It shouldn't, correct?

A. That's right, it shouldn't.

Q. In your understanding of the functions you perform for the job that you now hold as Lorain County Domestic Relations Court Referee that it does not?

MR. FLANAGAN: Does not what?

MR. NIERMANN: Does not require you to hold certain political beliefs or to partisan political beliefs or to act in furtherance of those beliefs?

MR. FLANAGAN: Objection.

* * * *

Q. When you hear cases for the court, do you set policy?

MR. FLANAGAN: Objection.

WITNESS: I don't know what you mean.

BY MR. NIERMANN:

Q. You talked about policy.

A. I make findings and recommendations, and it goes to the judge.

Q. That's what you do when you hear cases?

A. Yes.

Q. In your job as your court referee do you have constant and direct highly confidential communications on political matters with Judge Zieba or Judge Basinski that affects the decisions you make as referee?

MR. FLANAGAN: Objection.

WITNESS: No.

BY MR. NIERMANN:

Q. You don't have daily contact with Judge Zieba in the performance of your duties, do you?

A. I greet him daily.

Q. I mean as part of your duties...

* * * *

...aside from saying hello?

A. Not every day. We have a smooth running organization.

Q. When you make your recommendation after hearing a case to either Judge Zieba or Judge Basinski, is that recommendation ever altered in any way based upon political affiliation?

MR. FLANAGAN: Objection.

WITNESS: That is a difficult question to answer. I don't know whether or not Judge Basinski or Judge Zieba would alter one of my recommendations based on politics.

BY MR. NIERMANN:

Q. Do you have any reason to believe that they have?

MS. THEODOTOU: Objection.

WITNESS: I don't know. Nobody ever said. I am overruling you because of your politics.

BY MR. NIERMANN:

Q. So, your answer is no?

A. That's correct.

MR. FLANAGAN: Objection.

APPENDIX U

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

EXCERPTS OF DEPOSITION OF
FRANK GIAMBOI

Civil No. 1:90-CV-2243
taken 3/22/91

Pages U-1 thru U-5

Excerpts of Deposition of **Frank Giamboi**.

(Deposition taken 3/22/91)

* * * *

Q. Are the policies that are discussed at these meetings discussions of how to implement legislation? Are those policy discussions of a partisan political nature, or are they of a legal nature?

MR. FLANAGAN: Objection.

WITNESS: Do you want me to answer?

MR. FLANAGAN: Yes, go ahead.

WITNESS: Legal.

BY MR. NIERMANN:

Q. They are of a legal nature. Do you belong to a political party?

A. I am registered independent, so I guess that makes me part of the independent party?

Q. Is politics a part of your job?

MR. FLANAGAN: Objection.

WITNESS: Is politics a part of my job? I don't think so since one judge is a Democrat and one is a Republican, and they both want me to do a good job.

BY MR. NIERMANN:

Q. So, politics doesn't become a part of your doing a good job, does it?

MR. FLANAGAN: Objection.

* * * *

WITNESS: No.

BY MR. NIERMANN:

Q. It is not an integral part of your job, is it?

MR. FLANAGAN: Objection.

WITNESS: No.

BY MR. NIERMANN:

Q. Do you ever process confidential or political materials for either Judge Zieba or Judge Basinski?

A. Process?

Q. Confidential or political materials for either Judge Basinski or Judge Zieba as a part of your duties as a referee?

A. A lot of the juvenile stuff is confidential. Obviously, you realize that.

Q. By its own nature as a legal matter, correct?

A. Right.

Q. But I mean specifically with relation to the judge's activities, not your activities as a referee in court, but do you have any other duties as a referee for Lorain County Domestic Relations Court in your capacity as a juvenile court referee or in the 4D hearings that...

* * * *

A. Every time I have a hearing somebody has got to come in. They are scheduled every twenty minutes or half an hour, and sometimes they last five or ten minutes. Sometimes they last twenty-five to thirty minutes.

Q. Let me ask the question this way: Where else do you perform your duties aside from your office? Are there any other locations in the building that we are sitting in now?

A. No.

Q. Are you required to go to either Judge Zieba's chambers or Judge Basinski's chambers to perform any of your duties?

A. Yes, sometimes they call you down and they will say "What is this entry" or "I don't understand it" or "Can you tell me about this case?"

Q. How often does that happen?

A. Every time they don't understand one, they call you down.

Q. How often is it that they don't understand your recommendation?

A. Not very often.

Q. On a weekly basis we have thirty-two hours. How many hours or minutes would you spend...

* * * *

...out of an average week?

A. Talking to the judges about something they don't understand that I have done?

Q. Right. Five minutes or ten minutes on the average?

A. On a good week no minutes. Maybe on average less than -- between the both of them, less than one case a week maybe.

Q. So, it is p.)bably ten or fifteen minutes a week at the most?

A. Max. I try not to give them any excuse to call me down.

Q. You pretty much function on an independent basis?

A. Yes.

Q. Are you governed by the same court rules that the other domestic relations court referees are that do domestic work only like Mr. Musson and Mr. Balunek?

By that, I mean Civil Rule 53. Does that play --

A. You mean like referees' reports and recommendations?

Q. Right.

A. When I have to write them, I always...

* * * *

Q. Do you know Dave Mumford?

A. I don't think we have ever met, and if we did it was maybe once. Anything is possible. I don't remember.

Q. Did you ever appear before Dave Mumford as part of your private practice?

A. No, I did not.

Q. Did you ever hear anyone at all tell you why Dave Mumford was fired?

A. No.

Q. In the performance of your referee duties, is there any need for you to keep partisan political confidences?

MR. FLANAGAN: Objection.

WITNESS: You say partisan political confidences. I think of partisan being Republican or Democratic.

BY MR. NIERMANN:

Q. Right. Understanding the question that way, what would your answer be?

A. I am independent, so I don't know. I am partisan to either of them. That's the problem. Do you know what I am saying?

Q. Is it a problem?

A. It is not a problem.

* * * *

Q. My question is: In the performance of your duties, do you share political confidences with either of the judges?

MR. FLANAGAN: Objection

You may answer.

WITNESS: I really don't know what you mean by political confidences. They share things with me because of the nature of the job.

BY MR. NIERMANN:

Q. What kinds of things do they share with you because of the nature of the job?

A. I make a recommendation to them about how we would like to see something done. They make a recommendation to me to say: Let's try it like this. Let's do that.

Q. Is that the extent of the discussions you have as

part of your job?

A. Yes. Our discussions are geared toward our jobs.

Q. You don't have any other types of discussions aside from what you have described?

A. I don't believe so.

Q. Who is your immediate supervisor?

A. Judge Basinski and Judge Zieba.

APPENDIX V

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

EXCERPTS OF DEPOSITION OF
HERBERT JACOBY

Civil No. 1:90-CV-2243
taken 11/21/94

Pages V-1 thru V-7

Excerpts of Deposition of **Herbert Jacoby**.

(Deposition taken 11/21/94)

* * * *

[page 13]

A. ...policies, or whatever, they set their own. It is completely autonomous, except in the area of budget.

Q. So as it relates to employment decisions, the Administrative Judge has the ultimate authority to make employment policy and employment decisions, as it relates to the employees?

A. I would imagine...I can say for sure, the Commissioners do not.

Q. Do you know of any other entity who, aside from the Commissioners, who might?

A. Who might what?

Q. Who might have any control over the employment decisions made by the Administrative Judges--

A. All the --

Q. You've got to let me finish the question.

A. All the elected officials in Lorain County do their own hiring, set their own policies, make all their own decisions, with the exception of their budget. That's the only area of control we have over the departments.

* * * *

[page 15]

Q. Was that when Judge Zieba was elected?

A. Yes.

Q. When Judge Zieba was elected, he became the... ...Administrative Judge right off the bat?

A. I don't recall whether it was him or Judge Basinski. I don't remember.

Q. Are all the employees who work at the Domestic Relations Court, employees of Lorain County?

A. Are they all employees of Lorain County?

Q. Yes.

A. I would say, yes, they are.

Q. Would that include the Judges?

A. Yes.

Q. Does Lorain County issue paychecks to Judge Basinski and Judge Zieba?

A. Yes, Lorain County Auditor does.

Q. That's the same for Referees?

A. Yes.

Q. Is there any department of the 34 departments that the Lorain County Commissioners fund, is there any department for which Lorain County Commissioners set policy and custom for making final employment decisions?

* * * *

[page 16]

A. Yes. There is some of them that are under the direct control of the Commissioners.

Q. Who would those be?

A. The 911 department, for one. The Emergency Management Agency, for another. The Dog Warden and

his staff. Human Services, to some extent. We appoint... ...the Director. Golden Acres Nursing Home. Of course, all the maintenance employees. Off the top of my head, that's about all I can remember that are under the direct control of the Commissioners.

Q. Again, Lorain County Domestic Relations Court, the Commissioners delegate the authority to make final and binding employment-related decisions and to set custom and policy for that court, that's all been delegated a hundred percent to the --

MR. FLANAGAN: Objection.

MR. NIERMANN: I haven't finished.

Q. That's all been delegated to the Administrative Judge, him or her, correct?

MR. FLANAGAN: Objection.

You may answer.

* * * *

[page 17]

A. As far as I understand it... It wasn't delegated by the Commissioners, I know that. It is probably under the Ohio Revised Code.

Q. But the Commissioners themselves, have no participation in setting custom or policy for employment decisions within the Lorain County Domestic Relations Court?

A. None, whatsoever, only in the areas of the budget.

Q. Do county employees have any right to appeal... ...employment decisions made by the Administrative Judge of Lorain County Domestic Relations Court from 1988 to the present, to the Commissioners?

MR. FLANAGAN: Objection.

You may answer.

A. I don't believe they have a right to appeal to the Commissioners... They probably have avenues for appeal, but certainly one of them is not to the Commissioners, since we have no voice or responsibilities in their hiring or employment policies.

Q. Is there any other official in the Lorain...

* * * *

[page 18]

...County Domestic Relations Court that has a higher ranking than the Administrative Judge?

A. Not that I know of.

Q. Who represents the County in this case?

MR. FLANAGAN: Objection.

You may answer.

A. I really don't know. I didn't even know whether or not we were parties to this... The prosecutor's office is our legal source, the Commissioners' legal source.

Q. Does the prosecutor's office also represent all the departments within the county?

MR. FLANAGAN: Objection.

A. As far as I know, they do, with some exceptions, I imagine.

Q. Exceptions would be what?

A. Well, I can only speak for the Commissioners... If for some reason, we didn't want the prosecutors to be our legal counsel, I believe we have the authority to hire private counsel for ourselves, I don't know about the other departments.

Q. The Lorain County Domestic Relations Court...

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[page 25]

...Bob, I will just say to you on the record, we have got two other Commissioners slated, current Commissioners, Blair and Vasi. I also know we have got another Commissioner, Commissioner Koury, former Commissioner Koury slated for today. I may ask him some questions in this area, regardless of what I'm about to say. As far as the two current Commissioners, I think what I might want to do, as a way to take care of what we talked about earlier, which is the potential not to have to keep bringing Commissioners back to say the same thing. I think we both may want to wait until we get a copy of the transcript of this deposition. My thinking would be to hold off on deposing Commissioner Blair and Commissioner Vasi, until we've had an opportunity to review the transcript, and both had an opportunity to decide...

* * * *

[page 26]

...whether or not we would want to, whether we would want to stipulate that this witness' testimony would be the testimony for the Commission, itself as an entity and, therefore, not to depose every single Commissioner.

MR. FLANAGAN: It would be my belief that Commissioner Vasi and Commissioner Blair would provide the same answers, if they were asked of Commissioner Jacoby. Obviously, the only difference would be the personal questions on how long they've been Commissioner, but in terms of the substance of the deposition, I think their testimony, as to how general and special fund departments are funded, what authority the Commissioners do and do not have over the Domestic Relations Court, and those answers would be identical and the same.

MR. NIERMANN: What we ...

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[page 27]

...will do then, on behalf of Mr. Mumford, I will indicate on the record that based upon the fact that the parties are filing a joint motion to enlarge discovery to 60 days before trial, we will reserve the right to recall Commissioner Blair and Commissioner Vasi at sometime in the future, after we've had an opportunity to discuss entering into stipulations that would bind the County as it relates to...

...testimony we've heard today. That doesn't mean I won't be asking Mr. Koury some questions along the same lines.

We are through.

(Signature not waived.)

/s/ Herbert Jacoby

APPENDIX W

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

EXCERPTS OF DEPOSITION OF
HENRY T. WEBBER

Civil No. 1:90-CV-2243
taken 4/25/91

Pages W-1 thru W-19

Excerpts of Deposition of **Henry T. Webber**.

(Deposition taken 4/25/91)

* * * *

[page 58]

...time to implement at that particular time. And I think -- and, again, this is just my recollection, that may not have been exactly the way it was. I know that several of the other Judges from other counties spoke with us, too, at that time about the implementation of that. And we were exchanging some ideas and views.

Basically, the Chief Referee and I, or any of the Referees and I sometimes would go for days with nothing more than a hello or goodbye, because of any volume of work we were handling. I mean you would pass in the hallway and say hi, you know. But there would be times when David's hearing room was down the hall from me, because oftentimes we worked through lunch hour, I would anyway, and I might be working later than the Referees. I know the current Judges have the same problem, have to work late at times.

In fact, you might not even see them. They would be in a hearing or something. You wouldn't see them during the day, and evening you would be leaving after they left.

So, my feeling with the Chief Referee was that his job was procedural to see that the procedural aspects of the functions of the Referees was moving along.

And that was, other than that, it was hearings, inundated with hearings.

Q. Anything else you would like to add in response to...

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[page 60]

A. I suppose in a broad context, yes. I would call it more procedural than ministerial, because this is not something that occurred on a daily or weekly basis. It was the kind of thing that when there was a change in the law or something that occurred that we felt we needed to address by way of how are we going to procedurally handle this, generally, I would have, my recollection is that we would discuss that with David, unless I made a decision without discussing it with anyone as how we were going to handle it.

Q. Implementing policy and procedure, that was an important issue?

MR. NIERMANN: Objection.

A. No. Policy, no, procedures, as far as legal procedures, was a very small portion of the overall duty in the sense of discussing how we were going to implement various changes in the law. The vast majority of the work of the Referees, all the Referees, was hearings.

Obviously, there was what I suppose would be defined as ministerial. You write up your report and you submit it to the Judge, and he takes a look; and he either approves it or doesn't approve it. And I suppose, in most Courts, the overwhelming majority -- I don't know what the percentage would be, would be approved. Every once in awhile, you find something in the report you didn't quite...

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[page 61]

...approve; and you'd ask the Referee to come in and how he came to this; and if there was a logical explanation, approve it, if not, you ask him to reconsider it.

Q. On the 5 or 6 occasions when you requested Mr. Mumford to prepare a rough draft of opinions in various cases, did you consider those assignments to be ministerial

in nature or were they more important than that?

A. I wouldn't say they're ministerial. I considered that part of his professional responsibility.

Q. With respect to the law clerk's duties that you mentioned, would those be ministerial in nature, or would that be part of the professional aspect of the Referee's position?

A. Well, I considered it professional because I considered -- the reason that I was doing that was that I wanted someone, who if they didn't have more time than I, I wanted, at least, to have the opportunity to find the time to check some things for me; and I expected that they would be able to do it in a lawyer-like manner, so that the product would, at least, be reasonably competent when we submitted it.

Q. You would have the same opinion with respect to the interception of the Ford bonus checks that you mentioned?

A. That was procedural thing. the reason that comes...

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[page 66]

...and of itself separated that position from a secretarial position. And I don't mean to demean secretarial positions, but just the requirement was different, the function was different. They were to counsel and assist as opposed to simply handle paperwork.

Q. In you opinion, who is a better Referee, Gerald Strait or David Mumford?

MR. NIERMANN: Objection as to relevance. This case is not about as -- to be in an equal employment opportunity context using a comparative type of situation, again, you can answer.

A. I considered them both very good Referees. I never had any complaints voiced to me about either one of them that I can recall. I mean everybody has complaints about miscellaneous things, but no real complaints voiced to me about either one of them.

Any time I assigned anything to them for hearing, what I got back, I felt, was done professionally; and I certainly could not -- would not want to say that one was better than the other. My recollection, and I could be wrong, but ,y recollection is that Mr. Strait primarily was hearing Juvenile cases, and he did hear some DR; and Mr. Mumford was hearing primarily DR, and did some Juvenile. But there was, again, that's part of the allocation of the work as we broke it up.

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[page 75]

Q. With respect to the attorneys we have spoken about, back to Allen Spike for a moment, do you feel that Allen Spike is an honest person?

A. Let me say this to you, I think that all the lawyers that practice in that area of the law are honest and professional; and I have no reason to doubt their honesty or their integrity.

Q. Thank you.

A. Even if I violently disagree with them sometimes.

Q. With the attorneys that we have mentioned, they would not be individuals who would -- strike that. During your tenure as Judge, did you consider your Chief Referee the key confidential employee of the Court?

A. No.

Q. Why not?

A. Just wasn't the nature. Again, Referees are hearing officers. They spent almost all of their time hearing cases; and they did, and I did. And there wasn't --

that just wasn't the nature of the animal. That, at lease, is my perception of the job.

Q. Would you agree with me that different Judges have different philosophies?

A. Oh, absolutely.

Q. Will you agree with me that the philosophy of Judge A in deciding a case a particular was, can be different than...

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page 80]

...you did wrong?

A. No, I'm not suggesting that they're wrong in that sense. I'm saying that's not how I looked upon a hearing officer. My concern with a hearing officer is that they should not get involved procedurally anymore than they have to with it. Because their job really isn't that. The Administrative Judge is really put in a tough position because, to some degree, he had to formulate policy. But, it would be my thought that most of the matters are best administered by people who are hired by the Court to do administrative jobs, as opposed to hearings.

For instance, even -- my recollection of the Juvenile role of a person who was a hearing officer was not to be a Probation Officer, or anything else, if they were going to be a hearing officer.

Now, I would have to check if that's changed or not, but at one time, that was my understanding of it. I think they should be hearing officers; and that's what their job is.

Q. The last several minutes we have been talking policy-making Referees. If we could move on to a key confidential type Referee.

A. Mmm-hmm.

Q. Would you response be the same insofar as a...

* * * *

[page 81]

...particular Judge should have a key confidential Chief Referee, and that would be fine. Another Judge could have just a professional Referee as I gather you had or your --

A. At least, that's how I perceived it.

Q. How you perceived it, would your response to the confidential Referee be the same as it would to policy-making Referee?

MR. NIERMANN: At this point, I want to enter an objection upon the record because every time I asked a similar question of any witness up to this point in time, it drew an objection; and now counsel for the Defendants is asking the same type of question, so I to question the good faith of the objections made by Defense counsel on those types of questions.

A. Can you ask the question again?

Q. Yes. Okay. When you were Judge, did you consider your Referees to be your Chief Referees -- excuse me -- a key Court employee?

A. I considered all my Referees to be key Court employees. The Referees have as much contact with people. In fact, they have more contact with the people than does the Judge, actually.

And, so, in my opinion, they are what you call them -- excuse me, key, in the sense it's very important to the work product at the Court, hen they're key,...

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[page 82]

...certainly.

Q. Would you consider the Referees, at times, specifically, your Chief Referee, to be the eyes and ears of the Court?

A. No.

Q. Would you consider your Chief Referee, at times, to be the alter ego of the appointing Judge?

A. No.

Q. Moving onto confidential. Do you consider your Referees to be confidential Court employees?

A. Did I consider my Referees to be confidential Court employees? I don't believe so, no. You're asking me and I'm thinking -- I don't think I ever addressed that issue in my mind. If you're asking me whether I considered them to be confidential employees, no, I don't think so. I think I valued their input if we were to discuss procedural issues. If we were discussing legal issues, I wouldn't sit down and talk with a Referee about an employee or something like that, not normally, anyway.

A. Did you implicitly trust your Chief Referee when you were Judge?

A. I thought I could trust all my Referees, and I still have no reason to doubt that.

Q. Okay.

A. I mean, you know, that's the kind of question where...

* * * *

[page 83]

...you know, until somebody shows you there is something you should know about, you assume there is nothing wrong. And I assume that I had no reason to doubt their work or their competency.

Q. Have you ever discussed this lawsuit with David Mumford?

A. Oh, I did, yes.

Q. How many times?

A. My recollection --

Q. How many times did you have discussions with Mr. Mumford?

A. My recollection is 2 occasions in person, very briefly; and, I believe, maybe 2 phone calls and maybe 3. I can't really tell you. One of those was in reference to my willingness to voluntarily appear. And if you consider the one that I think my secretary discussed with him, as opposed to me, roughly about time and so forth, I think that's pretty close.

Q. Okay. When, other than making arrangements for your deposition, when was the last time you spoke to David Mumford about this lawsuit?

A. I believe a couple of days ago.

Q. Okay. And what was the nature that conversation?

A. My recollection is that there was a phone call, that they had completed the deposition at the Holiday Inn, or...

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[page 84]

...something, and were in town. And he and his counsel indicated that they would like to -- saying his counsel, I don't remember if I talked to David or my secretary did, but I think it was me. And I indicated that if they wanted to stop by that I would be glad to talk to them for a few moments, if they wanted to.

Q. Did you go meet with them?

A. No, they came to my office. And they were there very briefly. I don't know how long it was. It was no real great detail discussion about anything. I still don't even know what the pleadings look like in his case, to be honest with you. I don't know what's alleged or what isn't alleged other than in general terms that he's got a lawsuit in reference to his discharge. There was, I think, some discussion as to how much time this was going to take because I had some other things today that I wanted to do.

I think I made some comment about whether or not this would be more than 1-1/2 or so. I think their response is they didn't know.

They dropped off a map, which I think I have in the car, which my daughter navigated from today when we came. And the thought was this is where you're going, and I think they indicated there would be coffee and donuts. It was not -- there was some discussion about general things, but I don't remember what the questions were. I think I had...

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[page 85]

...like 3 general or 4 general questions like that. I don't remember what they were. But I didn't write them down. I didn't take long in answering them. I would guess they were at my office 15 minutes, 20 minutes. I don't know. I didn't time them.

Q. Okay. And I guess that leaves 2 brief in-person conversations you had with David Mumford, and maybe 1 or 2 phone calls you had with David Mumford?

A. My recollection is -- in reference to the case, my recollection is there was one other in-person one. His counsel and he asked if they could see me in reference to this case.

Q. This is not about a couple of days ago?

A. Oh, no, this goes back -- I don't recall the exact date. I was very busy, and for one reason or another, I could not be available specifically when they were going to be in town or something like that. They called and indicated, I think, they would be at the corner restaurant. And I zipped down; and I think the conversation was probably 10 minutes.

And I think they offered me a cup of coffee; I don't remember if I had a cup of coffee or not. They had an

affidavit. It was explained to me they were interested in having some information before filing. They gave me the affidavit. I indicated I'd look it over and maybe redo...

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[page 86]

...it. And I don't think I ever got around to redoing it; and I don't think I ever gave them an affidavit.

Q. Do you have this affidavit that they gave to you?

A. Of, God, I don't know if it's in the office or not.

Q. Do you recall what the affidavit stated?

A. No, not right offhand. I'm going to be very candid, I didn't particularly want to get involved in this lawsuit, if you wa: : me to be very, very candid about it.

Q. Did you get a copy of the affidavit or an original affidavit?

A. I think it was an original. But I'm not sure. I got it. I looked at it. I don't remember what it was. But I wasn't quite -- I don't think I wanted to sign it in that form. I thought I might regenerate an affidavit that I thought reflected my thoughts more.

I didn't do it, didn't have time to do it, to be very candid with you, it's one of those kinds of things that got stuck somewhere in a pile, maybe we'll do this some day if we get time. That's about it.

Q. During this affidavit meeting at the corner restaurant, was there any talk of any other witnesses having signed or in line to sign a similar affidavit, do you recall?

A. There could have been some, I don't recall. I think they said they had talked to other people.

* * * *

[page 87]

Q. Do you recall who they had mentioned as having talked to them?

A. I don't remember if they said or had or were intending to talk to the Court Administrator.

Q. Who would that be?

A. It would have been Catherine Catansarite. I don't recall if they talked to her, I don't recall if they gave her an affidavit or not. I never discussed it to my recollection. I don't see her very often. Whether or not she ever said to me, when I did see her at a political function or something, David's filing a lawsuit, and I said yeah, I think so, yeah, I know, but I don't have any real recollection of these things. If it was in a passing matter, that's all I can recall.

Again, this is my recollection, if you said such and such a date, if you happen to have one, I don't recall those kinds of things.

Q. At any point in time, did you ever have any conversation with Judge Zieba about Mr. Mumford's termination?

A. Not to my recollection. I don't think I had with either Judge.

Q. Do you have --

A. Again, I don't know whether earlier on I stopped in a few times and talked with the Judge, we couldn't find a...

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[page 88]

...key to the one filing cabinet, that, unfortunately, had gotten locked. I don't know whether that key was.ever found or not. I don't think I ever found it. I don't think it was ever found.

There were some discussions at times. I don't recall that there was ever any discussions of anybody on the staff to be honest with you.

Q. At this point in time, as you sit here today during the deposition, you're not in a position to quote Judge Zieba as having specifically said anything about Mr. Mumford's termination, is that a fair summarization?

A. The fairest way I can be is, I don't recall Judge Zieba discussing it with me.

Q. Do you have any firsthand, personal knowledge as to why Mr. Mumford was terminated?

A. Do I know why Judge Zieba terminated Mr. Mumford, no.

Q. Based on your firsthand, personal knowledge?

A. No.

Q. Have you heard any rumors, town gossip, what have you, any statements made by Judge Zieba concerning the termination of Mr. Mumford?

MR. NIERMANN: Objection.

A. Right offhand, I can't say, you know, there has been discussions of lawyers saying, you know, this or that about this or that, but it's -- I don't remember.

* * * *

[page 89]

Q. Again, nothing that you can quote Judge Zieba as having allegedly said, is that correct?

A. No. To my knowledge, neither Judge has discussed it with me, and that's my recollection. Now, there could have been, but I don't recall any discussion with Judge Basinski or with Judge Zieba about any of the staff employees.

Q. So, as you sit here today, just so the record is completely clear, you have no firsthand, personal knowledge as to why Mr. Mumford was terminated, is that correct?

A. As far as to why Judge Zieba terminated him. The only way I would know how Judge Zieba or why

Judge Zieba terminated Mr. Mumford would be if Judge Zieba told me. I would not presume to second-guess Judge Zieba.

Q. And Judge Zieba has never told you why he terminated Mr. Mumford?

A. Not to my recollection.

Q. Additionally, as you sit here today, you're not in a position to repeat rumors or hearsay or statements, supposedly attributed to Judge Zieba, to determine why Judge Zieba --

MR. NIERMANN: I object.

A. First of all, I treat rumors and this kind of garbage that floats around with something close to contempt...

* * * *

[page 90]

...Having been on the Bench for 18 years, I heard more rumors that were incorrect about things than you can shake a stick at. And, so, quite candidly, if somebody came up and said this, I heard this, probably my instinct would be, oh, really? I'm going to go get a cup of coffee. It's not of any interest. Whatever Judge Zieba and Judge Basinski do with that Court is their prerogative as far as how they want to do their things, as long as it's consistent with the law prescribed and so forth. I guess that's their job.

Q. Okay. You feel that Judge Zieba had the prerogative to terminate Mr. Mumford?

MR. NIERMANN: Objection, calls for legal conclusion. This witness has already testified that he hasn't seen the pleadings. There's been no foundation laid that this witness understands or has reviewed or read the conditions and the case that relates to it.

A. I made no attempt then to ascertain the nature of the lawsuit, other than that I'm aware that there is a lawsuit that has to do with general particulars on that, I've done no research on it. I would feel myself in no position to comment on the lawsuit itself, per se. Nor would I be critical of the Judge if he made a decision to do something because every Judge who is an Administrative Judge has to do things; and, sometimes there are lawsuits,...

* * * *

[page 91]

...and sometimes there are not. You're a lawyer, is that correct?

A. I hope so.

Q. Have you ever read the First Amendment?

A. I think I read the First Amendment.

Q. That's to the United States Constitution?

A. Yes.

Q. Have you read the 14th Amendment to the Constitution?

A. Due Process, yes.

Q. And, as a lawyer, you generally understand that the First Amendment pertains to Freedom of Speech, is that correct?

A. Mmm-hmm.

Q. Is it your understanding with the 14th Amendment of the United States Constitution that the Amendment basically provides that the Bill of Rights, which are the First 10 Amendments to the Constitution --

A. That's right, that's my understanding.

Q. -- and it also has the Due Process Clause?

A. Mmm-hmm.

Q. While you were a Judge, were you ever named in your capacity as a Judge as a Defendant in a lawsuit that was filed under the Civil -- Federal Civil Rights Statute.

specifically 42 USC, Section 1983?

A. Specifically, I don't recall. We had a number of...

* * * *

[page 92]

...lawsuits. The Sheriff was sued. We were joined as parties in that. I think the Prosecutor was sued in one case, all 3 or 4 of us were involved in that.

At one time, it strikes me that somebody was suing us in various capacities, including the Children's Service Board for, I don't know, something like $200,000,000, or something. Quite frankly, I referred it to the Prosecutor's office. The Prosecutor's office handled those successfully. And I really did not bother myself when I got served with pleadings in that capacity. I used to pick the phone up and call the Prosecutor's office. And would say would you send someone up here? I think I have something for you.

Q. With respect to the 1983 litigation, is it your general understanding that the law prohibits governmental individuals from violating a person's Civil Rights? Is that a fair general statement as to what that law provides?

MR. NIERMANN: Objection.

A. My recollection is that it deals with those who violated under color of authority is my recollection of it.

Q. Governmental officials acting under color of the State Law violating Constitutional Rights of a person?

A. Mmm-hmm.

* * * *

[page 93]

Q. That's you general understanding?

A. That's generically correct.

Q. Have you ever heard of the Employment at Will Doctrine?

MR. NIERMANN: Objection.

Q. I asked if he ever heard of it.

A. Have I heard of the Employment at Will Doctrine?

Q. Yes.

A. I don't know that I heard of it specifically in those terms. I think what you're talking about is if a person has a right to hire and fire in generic terms those whom they wish to.

Q. With cause or regardless of cause?

A. Well, I think it's boiled down in case law to cause. Because I think if you don't have cause, you're probably going to end up with a problem out of it. My recollection of that is that body of case law, and that's not my expertise, has evolved pretty much from you hire and fire who you want and you hire and fire who you want within certain parameters.

Q. In 1988, did Mr. Mumford belong to a Chief Referee's Union? Was Mr. Mumford a member of a Union in 1988?

A. I'm going to have to say that within my definition of a Union, I don't think there was a Union.

Q. Okay. In 1988 --

* * * *

[page 103]

...County Domestic Relations Court Referee, was their political party a necessary qualification for the effectiveness and performance of their duties for that position?

MR. FLANAGAN: Objection.

A. No, it wasn't a necessary qualification.

Q. What was your impression of David Mumford as a Lorain County Domestic Relations Court Referee?

A. I think I already commented. I think all my Referees did good work, including David.

Q. Did Judge Zieba ever contact you after he was elected, before he took office, to ask you what your impression was of Mr. Mumford's performance as a Domestic Court Relations Court Referee?

A. Not to my recollection, no.

Q. Did you ever hear complaints from any individual, including, but not limited to, Allen Spike, Carrine Dawson, Gary Bennett, Jim Couch, Tim Smith, Gary Carrothers, or any other lawyers or non-lawyers that David Mumford was either performing his duties in an arrogant, childish fashion, or that he threw temper tantrums in the performance of his duties?

A. I don't recall any such discussions. I can't tell you that somebody at some time did say I'm unhappy about so-and-so, because I don't think he had done what he should...

* * * *

[page 105]

...filling a position.

Q. Are the inherent functions of a Referee based upon loyalty to a political philosophy or more so upon formal structural relationships dealing with Domestic Relations and Juvenile Law?

MR. FLANAGAN: Objection.

A. A good Referee will attempt to make a fair and impartial decision consistent with the law, and make his recommendations to the Court based on what he understands the evidence showed and what is appropriate given the law at the time. And that's the only way I can answer it.

Q. In your capacity as a Domestic Relations Court Judge, do you have constant, direct, face-to-face contact with David Mumford in the performance of his duties?

A. Constant, direct, face-to-face contact? If face-to-face contact is you pass somebody in the hall, I can't tell you whether it was daily or not, if I saw him, I went by his office at times. I spoke to him. If I had something I wanted to see him about, I'd ask him, or I left a message to have him see me before he left or something like that. But, I'm not quite sure what you're asking. So I can't quite say face-to-face, we saw each other. I don't know if it was every day. I think there was period of time where we didn't see each other every...

* * * *

[page 106]

...day.

Q. But in the performance of his duties?

A. No, I don't think so. Again, performance of his duties, walking down the hall, is that part of his duties to get to his office?

Q. To get to his office to do his work?

A. Yeah.

Q. In doing his work, when he got to his office, you weren't there, correct?

A. No, I wasn't in his office, and he wasn't in my office.

Q. Okay.

A. Unless I'd ask him to come to my office.

Q. On Monday mornings in the Domestic Relations Court, did the hallways and the Courtrooms and other areas, first thing in the morning, did they appear to be a zoo?

A. Sure, I used that term myself.

Q. And can you tell me --

A. I mean it depends.

Q. Can you tell me what the reasons for that was?

A. The volume of the work -- we attempted to give people a hearing within 7 days, or probably right around 7

days on TA orders, temporary alimony orders, or support orders, things of that nature. We didn't always succeed. That was an attempt. To do that we had to do some relatively...

APPENDIX X

UNITED STATES DISTRICT COURT
NOTHERN DISTRICT OF OHIO
EASTERN DIVISION

EXCERPTS OF DEPOSITION OF
JOSEPH ZIEBA

Case No. 1:90-CV-2243
taken March 23, 1991

Pages X-1 thru X-16

Excerpts of Deposition of **Joseph Zieba**.

(Deposition taken 3/23/91)

* * * *

[page 7]

...through 7 and 12 through 15, correct?

A. Yes.

Q. Those are your answers which you reviewed before you signed the verification?

A. I believe they are.

Q. They are correct responses?

A. I assume they are, yes.

Q. Keep that document and we will come back to some questions on that a little bit later.

When did you take office as the Judge of the Domestic Relations Court here in Lorain County?

A. I believe on January 3, 1989.

Q. Between that time and today could you tell me what the duties of a Domestic Relations Court Referee are? If they have changed during that time period between January 3, 1989 and March 23, 1991, tell me when the changes occurred and what they were?

A. Domestic Relations referee?

Q. Domestic Relations Court referee, yes.

MR. FLANAGAN: Do you mean the juvenile referees, the IV D referees, the DR referees, Munson and Balunek, or do you just...

* * * *

[page 8]

...mean Musson and Balunek?

MR. NIERMANN: I mean all of them.

MR. FLANAGAN: All categories?

MR. NIERMANN: All of them. You can do it however you want to organize that.

WITNESS: We have domestic relations referees and we have juvenile referees.

BY MR. NIERMANN:

Q. Those are the only two types that you have?

A. Yes. We serve in both capacities. This court is a domestic relations court and also a juvenile court. We wear two hats.

Of course the duties of the domestic relations referee when he is acting in that capacity, are really whatever references are made

to that referee under the Civil Rule 53.

Q. 53?

A. I believe it is 53.

Q. Okay.

A. And of course there is an applicable juvenile rule. I don't know the number off hand.

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[page 9]

MR. FLANAGAN: I can't answer.

WITNESS: I believe there is a juvenile rule that sets up the juvenile referee.

BY MR. NIERMANN:

Q. Is that similar to Rule 53?

A. Very, very similar although it is contained in the juvenile rules.

Q. But basically it gives the same extent of a reference?

A. I don't know that it is exactly identical because it makes reference to juvenile cases.

Q. But as far as the authority of the referee it is the same?

A. Yes.

Q. And that authority is the authority is to recommend?

A. Upon reference of course. Whatever the judge assigns to the juvenile referee it is handled. Then of course we also have what they call the IV D referee, and that's under the support section.

Q. it would still be under domestic...

* * * *

[page 10]

...then, right?

A. Well, it could be. In Lorain County, of course, we handle the support under the IV D, which is an administrative program from the Department of Human Services from the state in conjunction with the various governmental bodies.

Q. Is IV D a state legislation or federal?

A. A combination of state and federal. It is funded, I believe, by both, along with the local funding that they have. Of course, the function of that referee is he normally

handles all matters of support, which is very extensive, incoming, outgoing. When they say IV D, it is under Title IV is what the legislation was on the federal level.

Q. So, basically there are three categories of referees, domestic, juvenile, and IV D?

A. Right.

Q. Why don't we start with the domestic relations referee and tell me what their specific duties are on a day to day basis. What do they do for the court?

* * * *

[page 11]

A. The court reviews the recommendation, and yes, either approves, disapproves, or makes a decision as to --

Under 53 if you look at 53, it says that the court will either confirm or approve the findings, and of course at that point, we would sign that order.

Or if we find that there should be some additional matters -- we can ask that additional matters be heard. The court can take it on and hear it anew if he so feels.

This, by the way, is before any objections are made. Of course, once the order goes out --

Q. Whose order? The court's order?

A. The court's order accepting the referee's recommendation. It is then sent out under the rule. Of course, it is whether it is an interim order for 28 days or whether it is a permanent order.

Of course at that point it has to be sent to the parties and/or

their counsel, and of course they have a time element in which to object to any of the rulings that were made by the court approving the referee, and then of course they...

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[page 12]

...have to come in with their objections.

Then of course that would entail another hearing at that point giving counsel or the parties the opportunity to be heard at that time.

Q. These orders that the courts are making, these are the court's independent judgements, correct?

A. Based on the findings that the referee makes.

Q. But it is not a mere rubber stamp, is it?

A. It better not be.

Q. Rule 53 also says that referees may be used liberally to aid the court in the expedition of the court's business?

A. Right.

Q. Now, you understand that rule to mean that the referees are to aid the court in the courts business as opposed to aid the judges as to their personal business?

A. Oh, yes.

Q. Okay.

A. I don't use them as a chauffeur.

Q. Or for any other reason outside of

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[page 13]

Q. All I am trying to get at is anything discussed differently

than has been testified to yesterday and by you today that the IV D referee would talk about?

A. No, I don't believe so.

Q. How much time does the IV D referee, as opposed to domestic or juvenile referee, spend with you in your chambers?

A. I would say considerably less time, because most of that is pretty well factored in. These are mathematical computations he is working with most of the time.

Q. What political duties do the domestic, juvenile, or IV D referees have?

MR. FLANAGAN: Objection.

MS. THEODOTOU: Objection.

WITNESS: I don't know of any political duties that they have except they are free to follow their own conscience on politics.

BY MR. NIERMANN:

Q. Be it Republican, Democrat, Socialist, or anything else?

A. Whatever it be, yes.

Q. Politics is not a consideration, I...

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[page 14]

...take it, as far as the efficient smooth running of the position?

A. Absolutely not.

Q. Is your court now following a Lorain County Domestic Relations Court personnel policy manual?

Well, let me ask it this way. Is there a Lorain County Domestic Relations Court personnel policy manual?

A. We have two manuals.

Q. Two personnel policy manuals for the court?

A. Actually, we have a county manual which is a very sizeable manual that has been in existence that we have. Last year, not the first year, but last year, there was an attempt to put together a second manual by the administrative officer that had taken over when Judge Basinski came aboard, and he removed Joyce Motsch as the administrative officer and put Jack McCray as the administrative officer. That was his prerogative.

Joyce Motsch, of course, was given other duties, and of course Mr. McCray became the administrative officer or administrative head.

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[page 15]

Q. In seniority or age?

A. Seniority. Age. He had functioned in various capacities. As a matter of fact, when I came aboard, Jack came to me and inquired whether or not he was going to be retained, and I indicated I wasn't sure and that he was free to go ahead and look elsewhere if he felt so, but I made a promise to Jack at the time that if I felt his function would be terminated I would give him adequate notice so he could look for other jobs.

Jack was paid probably in the forty thousand dollar bracket.

He was one of the highest paid officials we had.

Q. Because of his time?

A. No, because of his duties. I assume, duties and time. Jack had been probably everything from the administrator all the way on down. He had served in various capacities with my predecessor.

When you asked about the manual, Jack did work out of manual which I did not approve.

Q. Did Judge Basinski approve of it?

A. I believe Judge Basinski approved it. When it came to me, we had a disagreement,...

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[page 16]

...and I indicated --

Q. About the contents?

A. Contents, and I didn't feel it was necessary because we had a county manual which I felt covered every aspect of it.

As a matter of fact, the county manual is more complete than the manual that Jack McCray put together.

Q. Do either of these manuals talk about personnel practices or who reports to who, etcetera, as it relates to the domestic relations court?

A. The county manual covers many aspects of the matter. The manual that was turned out -- by the way, the manual that Jack had put together, there were many factors in the manual which I felt were not applicable to our court at all.

Again, I can't cite you chapter and verse of the manual, but I indicated to Jack and to Judge Basinski that I wasn't in favor.

I felt our county manual was more than adequate at the time that we had it.

(A brief discussion was held off the record)

MR. NIERMANN: Judge, you are...

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[page 17]

...still under oath. I am going to make Bob a request. If you don't need it to be formal, I will just make an oral one now to ask to get copies of the two manuals that the Judge -- the county manual and the Domestic Relations Court manual.

MR. FLANAGAN: The county personnel manual is like this thick.

MR. NIERMANN: What I would like to be able to do is look through it and pick out the portions.

MR. FLANAGAN: That's fine. I anticipated this, and I asked the Judge about the DR personnel manual.

Apparently, with that manual, Judge Basinski approved it during his tenure as administrative judge and followed.

This past January Judge Zieba became administrative judge. He elected not to --

MR. NIERMANN: Follow it.

MR. FLANAGAN: -- follow it, and I guess vacated it or threw it out. I don't know if the DR personnel manual is

around. We will look for it. You say it is real thin?

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[page 18]

WITNESS: The county?

MR. FLANAGAN: No. The DR?

WITNESS: I don't know. I never had a copy of it.

MR. FLANAGAN: I don't know if a copy of the DR is available. If it is available, we will give you a copy. Since it is not in effect, I don't know if everything about it has been thrown out. That's all I am saying. That won't be a problem.

MR. NIERMANN: I don't particularly want the entirety of both manuals. I would just like to be able to look at them and pick out what's relevant.

MR. FLANAGAN: I understand the DR one is like that. The county one you can look at whenever.

MR. NIERMANN: Okay.

BY MR. NIERMANN:

Q. Judge, would it be a fair statement to say that to require of your domestic relations court referees that their jobs be dependent on their political beliefs would undermine rather than promote the effective performance of their...

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[page 19]

...jobs as domestic relations court referees?

A. What was the question again?

Q. Isn't it a fact that to require of your domestic relations court referees that their tenure be dependent upon their political beliefs would undermine rather than promote the effective performance of their jobs as domestic relations court referees?

MR. FLANAGAN: Objection.

MS. THEODOTOU: Objection.

WITNESS: That's a difficult question, but I would assume yes. I would agree with your statement basically, yes.

BY MR. NIERMANN:

Q. Judge, obviously, you can't answer questions for Judge Basinski, but I am going to try to ask you this question in reference to the Judge's of the Lorain County Domestic Relations Court if there is a difference for you than there is for Judge Basinski, and if you know about it, you can tell me, but basically who is on the staff of the Lorain County Domestic Relations Court Judges?

Who do they have on their staff? As...

* * * *

[page 20]

...do you mean?

Q. I am not talking about -- your referees wouldn't be staff people?

A. They certainly are as far as I'm concerned.

Q. When you refer to staff, you mean anybody that works

under your control?

A. Yes. I would consider the people that are in key positions as members of the staff.

Q. Your secretary, bailiff, court administrator?

A. Right.

Q. We have already talked about referees. Is there anybody else that works for you? I am trying to figure out what your organization looks like, who is in it, what job titles?

A. I think these people work for Judge Basinski and they work for me. I don't consider them exclusively my people.

Q. They are for the entire court?

A. For the court.

Q. You and Judge Basinski?

A. Yes.

Q. That would include the court...

* * * *

[page 21]

...reporter?

A. The court reporter. By the way, the court reporter is mine.

Q. Judge Basinski has his?

A. He has a court reporter, yes. We each have a court reporter, yes. As a matter of fact, I had Tom Clemento. I brought him out of retirement, and then Tom indicated he was too old so we went out and found a new girl and brought her in.

MR. NIERMANN: Let's go off the record.

(A brief discussion was held off the record)

BY MR. NIERMANN:

Q. We are back on the record. You are still under oath, Judge.

Each domestic relations court Judge has their own court reporter, correct?

A. Yes.

Q. Ann O'Reilly has been a court reporter for this court?

A. I don't recall her. I don't remember her at all.

Q. Do probation officers work for the domestic relations court?

* * * *

[page 22]

A. But I honestly felt that I would rather than to rehabilitate Mr. Mumford I would much rather start with a fresh person that I could depend on.

Q. Rehabilitate him from what? From his association with Judge Webber?

A. From whatever conduct that had taken place in this court before, yes.

Q. That conduct was --

A. The lack of performance, the back log of cases. This is what I ran on. This was my whole campaign platform.

Q. So, as a result of your platform, you felt that it would have been inappropriate to keep someone that you viewed as loyal to the person that you opposed in the campaign, correct?

MR. FLANAGAN: Objection.

MS. THEODOTOU: Objection.

WITNESS: Not only loyal but politically motivated. There were political motivations also.

BY MR. NIERMANN:

Q. On Mr. Mumford's part?

A. On the part of the people that I discharged. There is no question -- I ran for...

* * * *

[page 23]

...office three times. I ran twice on the municipal level for judge. The Webber people sent Judge Paul Timko down. He was a referee. Paul Timko came down to the municipal level and opposed me for the municipal judge and defeated me with the help --

There were at least 152 to 200 court employees that were manning the polls on the day of the election.

Q. And Mr. Mumford was one of them?

A. I am sure he was. That was in 1983. That was my first experience with the court and the court employees.

I believe I ran again in '85 for the full term at the municipal level and once again I had these people all campaigning, and as a matter of fact, I couldn't believe to see the court employees down at the polling places again.

Q. That would have included Mr. Mumford again?

A. I am sure Mr. Mumford was there. I am sure he was. He campaigned. I think he owed -- whether he felt he had

to or whether he was under the direction. These things were plus the great amount of money that was raised in this...

* * * *

[page 24]

...court for political purposes.

It was common knowledge that the employees all had to contribute to the political coffers of this court.

Q. Of Judge Webber?

A. Judge Webber and the people that were very close to Judge Webber, and Mr. Mumford was as close to Judge Webber as they could be. They were very close.

Q. That closeness to Judge Webber was one of the reasons you fired Mr. Mumford?

MR. FLANAGAN: Objection.

MS. THEODOTOU: Objection.

WITNESS: It is not one of the reasons. It is no question. Again, you asked me why I replaced him. I replaced him with somebody that I felt would be non political or at least a person that I could depend on their loyalty and trust and the execution of this particular job.

BY MR. NIERMANN:

Q. And you felt Mr. Mumford couldn't be loyal because he had been loyal to Judge Webber, correct?

MS. THEODOTOU: Objection.

* * * *

[page 25]

A. I don't know that you used the word "officially." Again, I don't want to nit-pick with you, but this was the letter I sent.

Q. Correct.

A. This was the letter I sent, yes. Whether it was officially -- I was acting as a judge, or at least I presumed --

Q. It says "Judge elect."

A. Yes. Whether or not that is the official communication or not, I don't know.

Q. You had no power to hire and fire, because you hadn't taken office yet?

A. That's right. This was an advisory. It was a matter of courtesy I think.

Q. Right. In actuality, Mr. Mumford's termination date is January 3, 1989, because that was the first day you had the power to fire him?

A. I would assume so.

Q. Okay. And the complaint, if you will take a look on Exhibit 11, in front of the page what's the filing date on that?

A. December 17 appears to be the stamp on it.

Q. December 17, 19 --

A. '90.

APPENDIX Y

UNITED STATES DISTRICT COURT
NOTHERN DISTRICT OF OHIO
EASTERN DIVISION

EXCERPTS OF DEPOSITION OF
JOSEPH ZIEBA

Case No. 1:90-CV-2243
taken June 15, 1991

Pages Y-1 thru Y-6

Excerpts of Deposition of **Joseph Zieba**.

(Deposition taken 6/15/91)

* * * *

[page 172]

BY MR. NIERMANN:

Q. Judge, during your campaign to become domestic relations court judge, do you recall having said to David Mumford, "Don't get caught in the cross-fire"?

A. I believe. I don't know if it was the exact words, but I believe I recall having made some comment to David about his position, yes.

Q. Can you explain more where you were and what you said?

A. If I remember correctly, didn't we discuss this before? I don't know if we did. I think it was at the community college Legal Women Voters or something, and there was a debate or a candidate appeared on a panel.

David had a large group of domestic employees with badges supporting Webber there. I don't remember how many, maybe thirty or forty employees of the court.

It was a noon hour affair that extended well into 3:00. I think merely at a recess -- people were milling around -- I saw David with a large Judge Webber sign, and I said to Dave , "Don't get caught in the cross-fire."...

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[page 173]

...I think It was more of a -- I don't think it was an

ultimatum. It was a jest. "Don't get caught in the cross-fire." Judge Webber and I were going at it pretty hot and heavy, and I really felt David probably wouldn't want to get caught between Judge Webber and myself.

Q. It seems he has though.

A. Well, he may have.

Q. On election day did you see Dave Mumford handing out literature for Judge Webber?

A. I really don't remember. I saw David on -- let's put it this way. I was involved in three elections, and I think I saw David on at least --

On all of the elections David was very actively participating in politics.

Q. For Judge Webber?

A. I would hope so. It was Judge Webber that he was participating for. By the way, I think on two elections he was participating on behalf of Judge Timko who was a referee with David. They were fellow referees here, and I think he was campaigning for Paul Timko, who was running against me in the municipal court.

That was on the first two occasions.

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[page 174]

Q. Right. And you don't dispute that you may have seen David on election day in November of '88 handing out literature for Judge Webber?

A. I am sure. They had had 180 out there or 130 out there

just handing out material.

Q. Judge, referees do have a sworn duty and a professional responsibility to apply existing law as far as they know it on domestic relations matters, is that correct?

A. Yes.

Q. I sincerely don't recall whether I asked this or not. With respect to Mr. Balunek and Mr. Musson, what qualifications were you aware of as far as experience goes that Mr. Balunek and Mr. Musson had to perform the functions of a domestic relations court referee prior to your putting them in the position?

MR. FLANAGAN: Objection.

You may answer.

WITNESS: I was personally familiar with both Mr. Musson and Mr. Balunek. Mr. Musson had been in the prosecutor's office. He served as prosecutor. I had observed some of Mr....

* * * *

[page 175]

...Musson's work while he was working in the north regional area. He was an attorney out of the North Ridgeville area.

Mr. Balunek was a personal friend. Over many years Mr. Balunek and I had spent countless hours discussing law, other matters, socializing. Mr. Balunek was a friend as well. He practiced law probably just eight or ten years shorter than myself. He had been in the arena.

We have gone to many functions together. As a matter of fact, Mr. Balunek had been a candidate for office himself as the judicial office, I think, in the Avon Lake area in the past.

Mr. Balunek had widespread general practice in domestic relations and personal injury, all phases.

I considered Mr. Balunek a very mature well rounded lawyer.

BY MR. NIERMANN:

Q. Had either one of them either been referees in any domestic relations court prior to them being referees in your court?

A. I know that Musson was a prosecutor....

* * * *

[page 176]

...Mr. Balunek, I know, also served for Judge Corts in the probate court in the mental health field as counsel, that I know of.

I don't know whether he was ever a referee as such. I think Balunek also had served as a judicial officer part time.

Q. Can I take your answer to mean that you have no knowledge that Mr. Balunek or Mr. Musson had ever been domestic relations court referees before?

A. No. That's right.

Q. What was the extent of Mr. Balunek's experience in domestic relations that you knew about prior to your putting

them in the position, just domestic relations?

A. I didn't track Mr. Balunek, but I know that he had spent time working in the domestic field.

Q. You don't know how much time?

A. Not exactly. No, I wouldn't know.

Q. How about Mr. Musson? Same question.

A. I think Mr. Musson probably spent, after he left the prosecutor's office, even more as he got back in the general practice, but while...

* * * *

[page 177]

...he was a prosecutor, maybe not as much.

Q. You don't know how much?

A. Also, both of these gentlemen were also -- Balunek is a Lieutenant commander in the Navy Reserve. I happened to have also been an Air Force World War II Pilot.

Mr. Balunek was World War II vintage just passed. Musson was an Air Force officer also.

By the way, he is in the legal staff with the Air Force, and I had been with the Judge Advocate Division of the Air Force.

Q. Did they do domestic relations court work while they were in the service?

A. Oh, yes. Mr. Musson had served as counsel for Reserve giving advice to people. He is a legal officer in the Reserve as an officer, and I am sure part of his counseling would be involving people who had domestic problems.

Q. You don't know how much?

A. No.

Q. And you didn't know it before you hired him?

A. Oh yes, I did.

Q. How much?

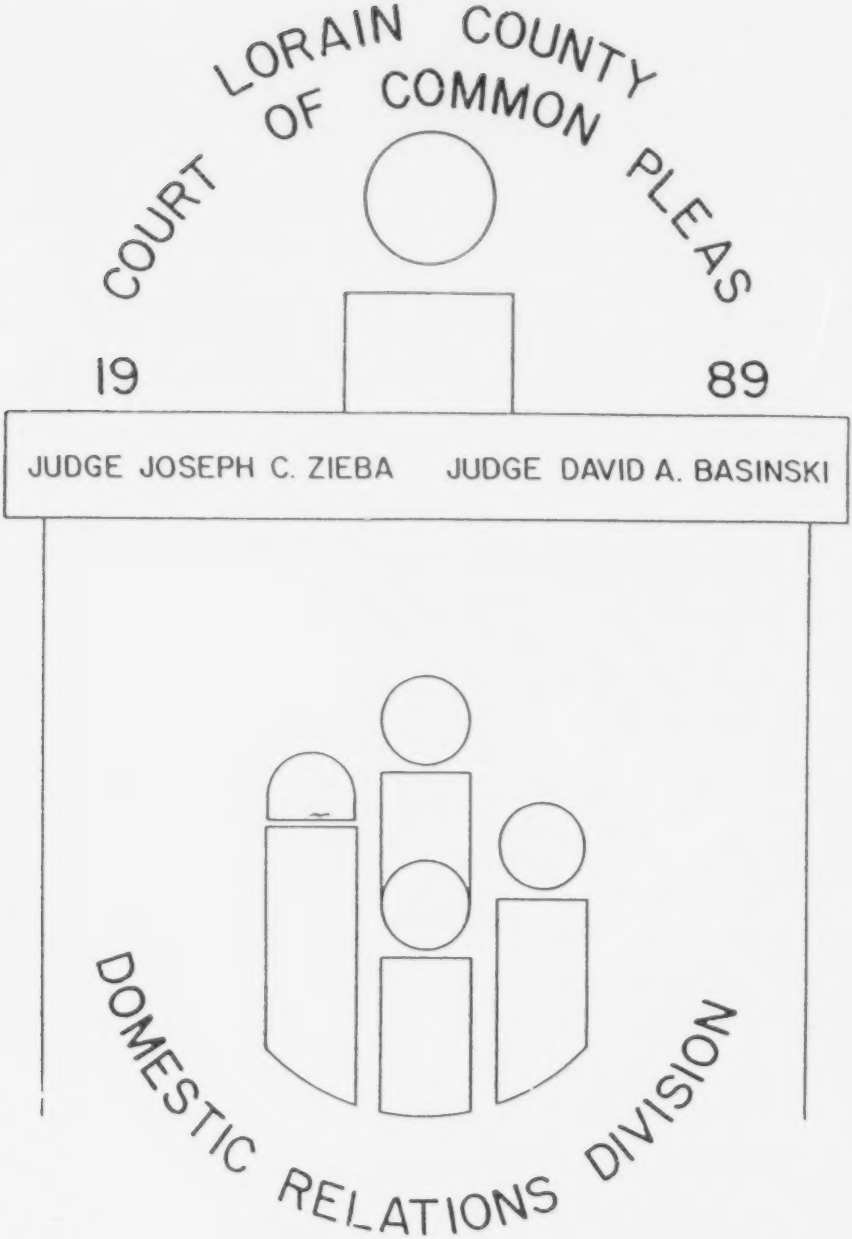
APPENDIX Z

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FACE SHEET TO 1989 ANNUAL
REPORT OF LORAIN COUNTY
COURT OF COMMON PLEAS

Case No. 1:90 CV 2243

Pages Z-1 thru Z-1



31ST ANNUAL REPORT

APPENDIX AA

UNITED STATES SUPREME COURT

OPINION

№ 96-542

Argued March 18, 1997

Decided June 2, 1997

Pages AA-1 thru AA-35

Nº 96-542

WALTER McMILLIAN, PETITIONER

v.

MONROE COUNTY, ALABAMA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Syllabus

Nº 96-542.

Argued March 18, 1997

Decided June 2, 1997

After spending six years on Alabama's death row, petitioner's capital murder conviction was reversed on the ground that the State had suppressed exculpatory evidence. He then sued respondent Monroe County and other under U.S.C. §1983 for the allegedly unconstitutional actions of, *inter alios*, County Sheriff Tom Tate in suppressing the

evidence. A county is liable under §1983 for those actions of its sheriff that constitute county "policy." *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 694. The District Court dismissed the claims, holding that Tate's unlawful acts did not represent Monroe County's policy, because an Alabama county has no authority to make law enforcement policy. The Court of Appeals affirmed, agreeing that a sheriff acting in his law enforcement capacity is not a policymaker for the county.

Held: Alabama sheriff's, when executing their law enforcement duties, represent the State of Alabama, not their counties.

(a) In determining a local government's §1983 liability, a court's task is to identify those who speak with final policymaking authority for the local government actor concerning the action alleged to have caused the violation at issue. *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 737. The parties agree that Sheriff Tate has final policymaking authority in the area of law enforcement, but they disagree about whether Alabama sheriffs are policymakers for the State or the county when acting in their law enforcement capacity. In deciding this dispute, the question is not whether Alabama sheriffs act as county or state officials in all of their official actions, but whom they represent in a particular area or on a particular issue. *Ibid.* This inquiry is dependent on the definition of the official's functions under relevant state law. Cf. *Regents of University of California v. Doe*, 519 U.S. ___, ___.

(b) The Court defers considerably to the Court of Appeals' expertise in interpreting Alabama law, see *Jett, supra*, at 738, and concludes that the State's constitutional provisions concerning sheriffs, the historical development of those provisions, and the interpretation given them by the State Supreme Court strongly support Monroe County's contention that sheriffs represent the State when acting in their law enforcement capacity. The relevant portions of the Alabama Code, although less compelling, also support this conclusion. Code provisions cutting in favor of the conclusion that sheriffs are county officials are insufficient to tip the balance in petitioner's favor.

(c) The Court rejects petitioner's arguments that the result here will create a lack of uniformity in Alabama - by allowing 67 county sheriffs to have different state law enforcement policies in their counties - and throughout the country - by permitting sheriffs to be classified as state officials in some States and county officials in others. The common law itself envisioned the possibility that state law enforcement "policies" might vary locally, as particular sheriffs adopted varying practices for arresting criminals or securing evidence. And the Nation's federal nature allows the State wide authority to set up their state and local governments as they wish. Petitioner's and his *amici's* concern that state and local governments will manipulate local officials' titles in a blatant effort to shield local governments from liability is foreclosed by *St. Louis v. Praprotnik*, 485 U.S. 112, 127 (*per curiam*).

88 F.3d 1573, affirmed.

REHNQUIST, C.J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which STEVENS, SOUTER, and BREYER, JJ., joined.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner sued Monroe County, Alabama under 42 U.S.C. §1983 for allegedly unconstitutional actions taken by Monroe County Sheriff Tom Tate. If the sheriff's actions constitute county "policy," then the county is liable for them. *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 694 (1978). The parties agree that the sheriff is a "policymaker" for §1983 purposes, but they disagree about whether he is a policymaker for Monroe County or for the State of Alabama. We hold that, as to the actions at issue here, Sheriff Tate represents the State of Alabama and is therefore not a county policymaker. We thus affirm the Court of Appeals' dismissal of petitioner's §1983 claims against Monroe County.

I

In November 1986, Ronda Morrison was murdered in Monroe County, a sparsely populated county located in

southwest Alabama. Petitioner and one Ralph Myers were indicted for this crime. Myers then pleaded guilty to a lesser offense and testified against petitioner at his trial. A jury convicted petitioner of capital murder, and the trial court sentenced him to death. After two remands, the Alabama Court of Criminal Appeals reversed petitioner's conviction, holding that the State had violated *Brady v. Maryland*, 373 U.S. 83 (1963), by suppressing statements from Myers that contradicted his trial testimony and other exculpatory evidence. *McMillian v. State*, 616 So. 2d 933, 942-948 (1993). Thus, after spending six years in prison, petitioner was released.

He then brought this §1983 lawsuit in the District Court for the Middle District of Alabama against respondent Monroe County and numerous officials, including three men in charge of investigating the Morrison murder - Tom Tate, the Sheriff of Monroe County; Larry Ikner, an investigator with the District Attorney's office in Monroe County; and Simon Benson, an investigator with the Alabama Bureau of Investigation.. Only two of the officials were sued in their official capacities - Sheriff Tate and investigator Ikner - and it is only these official-capacity suits that concern us here.[1]

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[1] The claims against the defendants in their individual capacities have proceeded independently in the lower courts, with some of petitioner's claims surviving motions for summary judgement. See *McMillian v. Johnson*, 878 F.Supp. 1473, 1544-1545 (MD Ala. 1995).

Petitioner principally alleged that Tate and Ikner, in their capacities as officials of Monroe County, not as officers of the State of Alabama, intimidated Myers into making false statements and suppressed exculpatory evidence. App. to Pet. for Cert. 26a-33a; *McMillian v. Johnson*, 878 F.Supp. 1472, 1486-1488 (MD Ala. 1995).

The District Court dismissed the claims against Monroe County and the claims against Tate and Ikner in their official capacities. The court held that "any unlawful acts of Defendants Tate and Ikner cannot be said to represent [Monroe] County's policy," because "an Alabama county has [no] authority to make policy in the area of law enforcement." App to Pet. for Cert. 55a. Petitioner appealed the District Court's decision as to Sheriff Tate. The Court of Appeals for the Eleventh Circuit affirmed, agreeing with the District Court that "Sheriff Tate is not a final policymaker for Monroe County in the area of law enforcement, because Monroe County has no law enforcement authority." *McMillian v. Johnson*, 8 F.3d 1573 (1996). We granted certiorari, 519 U.S. ___ (1996), and now affirm.

II

A

We held in *Monell*, 436 U.S., at 694, that a local government is liable under §1983 for its policies that cause constitutional torts. These policies may be set by the

government's lawmakers, "or by those whose edicts or acts may fairly be said to represent official policy." *Ibid.* A court's task is to "identify those officials or governmental bodies who speak with final policymaking authority for the local government actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue." *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 737 (1989). Here, the parties agree that Sheriff Tate has "final policymaking authority" in the area of law enforcement. They sharply disagree, however, about whether Alabama sheriffs are policymakers for the State or for the county when they act in a law enforcement capacity.[2]

In deciding this dispute, our inquiry is guided by two principles. First, the question is not whether Sheriff Tate acts for Alabama or Monroe County in some categorical, "all or nothing" manner. Our cases on the liability of local governments under §1983 instruct us to ask whether governmental officials are final policymakers for the local

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[2] We have explained that a suit against a governmental officer "in his official capacity" is the same as a suit against "'against [the] entity of which [the] officer is an agent,'" *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (quoting *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 690, n.55 (1978)), and that victory in such an "official-capacity" suit "imposes liability on the entity that [the officer] represents," *Brandon v. Holt*, 469 U.S. 464, 471 (1985).

government in a particular area, or on a particular issue. See *Jett*, 491 U.S., at 737 (court must identify "those officials who have the power to make official policy *on a particular issue*" (emphasis added)); *id.*, at 738 (question is whether school district superintendent "possesses final policymaking authority *in the area of* employee transfers" (emphasis added)); *St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988) (plurality opinion) {"[T]he challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy *in that area of* the city's business" (emphasis added)). Thus, we are not seeking to make a characterization of Alabama sheriffs that will hold true for every type of official action they engage in. We simply ask whether Sheriff Tate represents the State or the county when he acts in a law enforcement capacity.

Second, our inquiry is dependent on an analysis of state law. Cf. *Jett, supra*, at 737 ("'[W]hether a particular official has "final policymaking authority" is a question of *state law*'" (quoting, with original emphasis, *Praprotnik, supra*, at 123 (plurality opinion))); *Pembaur v. Cincinnati*, 475 U.S. 469, 483 (1986) (plurality opinion) (same). This is not to say that state law can answer the question for us by, for example, simply labeling as a state official an official who clearly makes county policy. But our understanding of the actual function of a governmental official, in a particular area, will necessarily be dependent on the definition of the official's functions under relevant

state law. Cf. *Regents of University of California v. Doe*, 519 U.S. ___, ___ (slip. op., at 5, n. 5) ("[The] federal question can be answered only after considering the provisions of state law that define the agency's character").

B

The Court of Appeals for the Eleventh Circuit determined that under Alabama law, a sheriff acting in his law enforcement capacity is not a policymaker for the county. Since the jurisdiction of the Court of Appeals includes Alabama, we defer considerably to that court's expertise in interpreting Alabama law.[3] See *Jett, supra*, at 738 ("We think the Court of Appeals [for the Fifth Circuit], whose expertise in interpreting Texas law is greater than our own, is in a better position to determine whether [the school district superintendent] possessed final policymaking authority in the area of employee transfers"); *Pembaur, supra*, at 484, n. 13 ("We generally accord great deference to the interpretation and application of state law by the courts of appeals").

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[3] We note that two of the three judges on the Eleventh Circuit's panel are based in Alabama. In addition, this is the second Eleventh Circuit panel to have reached this conclusion. See *Swint v. Wadley*, 5 F.3d 1435, 1450-1451 (1993), vacated for lack of appellate jurisdiction, 514 U.S. 35 (1995).

We begin with the Alabama Constitution, "the supreme law of the state." *Alexander v. State ex rel. Carver*, 150 So.2d 204, 208 (1963). We agree with the Court of Appeals that the constitutional provisions concerning sheriffs, the historical development of those provisions, and the interpretation given them by the Alabama Supreme Court strongly support Monroe County's contention that sheriffs represent the State, at least for some purposes. Alabama's Constitution, adopted in 1901, states that "[t]he executive department shall consist of a governor, lieutenant governor, attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, and a sheriff for each county." Ala. Const. of 1901, Art. V, §112. This designation is especially important for our purposes, because although every Alabama Constitution has included sheriffs as constitutional officers and has provided for their election by county voters, see Ala. Const. of 1819, Art. IV, §24; Ala. Const. of 1861, Art. IV, §24; Ala. Const. of 1865, Art. VII, §3; Ala. Const. of 1867, Art. V, §21; Ala. Const. of 1875, Art. V, §26; Ala. Const. of 1901, Art. V, §138, sheriffs have not always been explicitly listed as members of the state "executive department." Thus, the 1867 Constitution listed only the "governor, lieutenant governor, secretary of state, auditor, treasurer, and attorney general" as constituting "the executive department." Ala. Const. of 1867, Art. V, §1. This changed with the 1875 Constitution, when sheriffs

and the Superintendent of Education were added to the list. Ala Const. of 1875, Art. V, §1.[4]

The framers of the 1901 Constitution took two significant steps in an attempt to solidify the place of sheriffs in the executive department, and to clarify that sheriffs were acting for the State when exercising their law enforcement functions. First, faced with reports that sheriffs were allowing mobs to abduct prisoners and lynch them, the framers made such "neglect" by sheriffs an impeachable offense. See Ala. Const. of 1901, Art. V, §138 ("Whenever any prisoner is taken from jail, or from the custody of any sheriff or his deputy, and put to death, or suffers grievous bodily harm, owing to the neglect, connivance, cowardice, or other grave fault of the sheriff, such sheriff may be impeached"); *State ex rel. Garber v. Cazalas*, 162 Ala. 210, 50 So. 296 (1909) (sheriff's failure to close jail doors, resulting in lynching of prisoner, constitutes impeachable offense); M. McMillan, Constitutional Development in Alabama, 1789-1901, p. 338, n. 186 (1955) (impeachment provision resulted in "much progress made against lynching").

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[4] Executive department officers have to take the constitutional oath of office, Ala. Const of 1901, Art. XVII, §279; Ala. Const. of 1875, Art. XV, §1, and are required to submit written reports to the governor on demand. Submitting a false report was originally a crime, Ala. Const. of 1875, Art. V, §9, and is now an impeachable offense, Ala. Const. of 1901, Art. V, §121.

Second, authority to impeach sheriffs was moved from the county courts to the State Supreme Court, because of "[t]he failure of county courts to punish sheriffs for neglect of duty." *Parker v. Amerson*, 519 So. 2d 442, 443 (Ala. 1987). One of the primary purposes of this change, proposed by ex-Governor Thomas Goode Jones at the 1901 Convention, was "to augment the power of the Governor." *Id.*, at 444. After this change, the governor could order the State Supreme Court, rather than the county court, to begin impeachment proceedings against a wayward sheriff, and would not have to worry that local support for the sheriff would annul his effort at centralized control. See *ibid.*; Strengthening the Power of the Executive, Address of Emmet O'Neal, Governor of Alabama, 9-10 (Sept. 12, 1911) (new impeachment provision increases Governor's control of sheriffs and "gives the Executive real power which is respected and feared"). Thus, sheriffs now share the same impeachment procedures as state legal officers and lower state court judges, Ala. Const. of 1901, Art. VII, §174, rather than county and municipal officers, Ala. Const. of 1875, Art. VII, §3.

Critically for our case, the Alabama Supreme Court has interpreted these provisions and their historical background as evidence of "the framers' intent to ensure that sheriffs be considered executive officers of the state." *Parker*, 519 So. 2d, at 444. Based primarily on this understanding of the State Constitution, the court has held unequivocally that sheriffs are state officers, and that tort claims brought

against sheriffs based on their official acts therefore constitute suits against the State, not suits against the sheriff's county. *Id.*, at 443-445.[5] Thus, Alabama counties are not liable under a theory of *respondent superior* for a sheriff's official acts that are tortious. *Id.*, at 442. The issues in *Parker* are strikingly similar to the ones in the present case, and that decision is therefore strong evidence in favor of the Court of Appeals' conclusion that sheriffs act on behalf of the State, rather than the county, when acting in their law enforcement capacity.

Turning from the Alabama Constitution to the Alabama Code, the relevant provisions are less compelling, but still support the conclusion of the Court of Appeals to some extent. Section 36-22-2 of the Code sets out a sheriff's duties. First, a sheriff must "attend upon" the state courts in his county, must "obey the lawful orders and directions" of those courts, and must "execute and return the process

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[5] As a result of this holding and the State Constitution's sovereign immunity provision, see Ala. Const. of 1901, Art. I, §14 ("[T]he State of Alabama shall never be made a defendant in any court of law or equity"), the Alabama Supreme Court has held that a sheriff is absolutely immune from all suits for damages based on his official acts. *Parker v. Amerson*, 519 So. 2d, 442, 446 (Ala. 1987). See also *King v. Colbert County*, 620 So. 2d 623, 626 (Ala. 1993); *Boshell v. Walker County Sheriff*, 598 So. 2d 843, 844 (Ala. 1992); *Hereford v. Jefferson County*, 586 So. 2d 209, 210 (Ala. 1991).

and orders" of any state court, even those outside his county. Ala. Code §§36-22-3(1), (2) (1991). Thus, judges (who are state officers, see Ala. Const. of 1901, Amdt. 328, §6.01) may order the sheriff to take certain actions, even if the judge sits in a distant county. And under Ala. Code §12-17-24 (1995), the presiding circuit judge "exercise[s] a general supervision" over the county sheriffs in his circuit,[6] just as if the sheriffs are normal "court [i.e., state] employees" (see §12-17-1).

Second, the sheriff must give to the county treasurer a sworn written statement detailing the funds he has received for the county since his last statement, and must pay these funds to the treasurer. §36-22-3(3). In contrast to the state judges, however, the county treasurer does not appear to have any statutory authority to direct the sheriff to take specific actions.

Third and most importantly, "[i]t shall be the duty of sheriffs in their respective counties, by themselves or deputies, to ferret out crime, to apprehend and arrest criminals and, insofar as within their power, to secure evidence of crimes in their counties and to present a report of the evidence so secured to the district attorney or

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[6] Seventeen of the forty judicial circuits in Alabama contain more than one county, including the circuit in which Monroe County sits. Ala. Code §12-11-2 (1995).

assistant district attorney for the county." §36-22-3(4). By this mandate, sheriffs are given complete authority to enforce the state criminal law in their counties. In contrast, the "powers and duties" of the counties themselves - creatures of the State who have only the powers granted to them by the State, *Alexander*, 150 So. 2d, at 206 - do not include any provision in the area of law enforcement. Ala. Code §11-3-11 (1989). Thus, the "governing body" of the counties - which in every Alabama county is the county commission, see *Calvert v. Cullman County Comm'n*, 669 So. 2d 119 (Ala. 1995) (citing §11-1-5) - cannot instruct the sheriff how to ferret out crime, how to arrest a criminal, or how to secure evidence of a crime. And when the sheriff does secure evidence, he has an obligation to share this information not with the county commission, but with the district attorney (a state official, see *Hooks v. Hitt*, 539 So. 2d 157, 159 (Ala. 1988)).

While the county commission thus has no direct control over how the sheriff fulfills his law enforcement duty, the governor and the attorney general do have this kind of control. Pursuant to §36-22-5, they can direct the sheriff to investigate "any alleged violation of law in their counties." And after "proceed[ing] promptly" to complete this investigation, the sheriff must "promptly" write a report to the state official in charge of the investigation, stating his findings, listing the witnesses he has secured, and summarizing what the witnesses can prove. *Ibid.* In

addition, the salaries of all sheriffs are set by the state legislature, not by the county commissions. §36-22-16.

To all of this, petitioner counters with four important provisions that cut in favor of the conclusion that sheriffs are county officials. First, the sheriff's salary is paid "out of the county treasury." *Ibid.* Second, the county provides the sheriff with equipment (including cruisers), supplies, lodging, and reimbursement for expenses, to the extent "reasonably needed for the proper and efficient conduct of the affairs of the sheriff's office." §36-22-18. Third, the sheriff's jurisdiction is limited to the borders of his county. See, *e.g.*, §36-22-3(4) ("It shall be the duty of sheriffs *in their respective counties*...to ferret out crime" (emphasis added)). Fourth, the sheriff is elected locally by the voters in his county (as he has been since Alabama's 1819 Constitution). See Ala. Const. of 1901, Art. V, §138; Ala. Const. of 1819, Art. IV, §24.

We do not find these provisions sufficient to tip the balance in favor of petitioner. The county's payment of the sheriff's salary does not translate into control over him, since the county neither has the authority to change his salary nor the discretion to refuse payment completely. The county commissions do appear to have the discretion to deny funds to the sheriffs for their operations beyond what is "reasonably necessary." See *Etowah County Comm'n v. Hayes*, 569 So. 2d 397, 399 (Ala. 1990) (*per curiam*). But at most, this discretion would allow the commission to exert

an attenuated and indirect influence over the sheriff's operations.

Petitioner's contention that sheriffs are county officials because "state policymakers" typically make policy for the entire State (without limits on their jurisdiction) and are typically elected on a statewide (not local) basis, surely has some force. But district attorneys and state judges are often considered (and in Alabama are considered) state officials, even though they too have limited jurisdictions and are elected locally. These characteristics are therefore consistent with an understanding of the 67 Alabama sheriffs as state officials who have been locally placed throughout the State, with an element of control granted to the officials and residents of the county which receives the sheriff's services.[7]

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[7] Petitioner also makes three other points which we believe have little merit. First, he points out that when the sheriff's office is vacant or when the sheriff is incapacitated, it is the county coroner that fills in for the sheriff. Ala. Code §11-5-5 (1989). We note that this temporary assignment only lasts until the Governor appoints a replacement for the sheriff, who then serves out the remainder of the sheriff's term. Ala. Code §36-9-17 (1991). Thus, even assuming that the county coroner is a county official, we place little weight on this assignment of temporary responsibility, which by its nature must fall to an official who is already in the county and available to step in for the sheriff at any time. Second, petitioner cites several instances in the Code where a group of officials that

In sum, although there is some evidence in Alabama law that supports petitioner's argument, we think the weight of the evidence is strongly on the side of the conclusion reached by the Court of Appeals: Alabama sheriffs, when executing their law enforcement duties, represent the State of Alabama, not their counties. Cf. *Praprotnik*, 485 U.S., at 125 ("We are not, of course, predicting that state law will always speak with perfect clarity"); *id.*, at 126-127 ("It may not be possible to draw an elegant line that will resolve this conundrum").

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includes the sheriff is designated a group of "county officials" or "county employees." See, *e.g.*, §§36-3-4, 36-15-1, 36-22-16. But in light of the Alabama Supreme Court's conclusion that (i) sheriffs are state officials according to the State Constitution, see *Parker*, 519 So. 2d, at 443, and (ii) contrary statements in that court's prior decisions had ignored the Constitution and therefore should not be followed, *id.*, at 445 (citing, among other cases, *In re Opinions of Justices*, 225 Ala. 359, 143 So. 345 (1932)), we think that any contrary implication in the Code is entitled to little weight. Finally, petitioner relies on the Monroe County Commission's insurance policy - which, according to the District Court, "may cover...some, but not all, of the claims made against" Monroe County and Sheriff Tate in this suit, App. to Cert. Pet. 77a - to establish that the commission will pay any judgment rendered against Sheriff Tate. But this policy shows, at the most, that there was uncertainty as to whether the courts would consider Sheriff Tate a county policymaker in these circumstances, not that the county would pay any judgment against him.

Petitioner argues that this conclusion will create a lack of uniformity in Alabama and throughout the country. First, he argues that it is anomalous to have 67 different "state policymakers" in the person of Alabama's 67 county sheriffs, all of whom may have different "state law enforcement policies" in their counties. Second, he points out that most Federal Courts of Appeals have found county sheriffs to be county, not state, officials, and he implies that our affirmance of the Court of Appeals will either call those decisions into question or create an unacceptable patchwork of rulings as to §1983 liability of counties for the acts of their sheriffs. We reject both arguments: the first ignores the history of sheriffs, and the second ignores our Nation's federal nature.

English sheriffs (or "shire-reeves") were the King's "reeves" (officers or agents) in the "shires" (counties), at least after the Norman Conquest in 1066. See C. Wigan & D. Meston, Mather on Sheriff and Execution Law 1-2 (1935). Although chosen locally by the shire's inhabitants, the sheriff did "all the king's business in the county," 1 W. Blackstone, Commentaries on the Laws of England 328 (1765), and was "the keeper of the king's peace," *id.*, at 332. See also Wigan & Meston, *supra*, at 2 ("It is this position of the Sheriff as the executive officer of the Crown which has all along been the outstanding characteristic of the office").

As the basic forms of English government were transplanted in our country, it also became the common understanding here that the sheriff, though limited in jurisdiction to his county and generally elected by county voters,[8] was in reality an officer of the State, and ultimately represented the State in fulfilling his duty to keep the peace. See, *e.g.*, Wager, Introduction, in County Government Across the Nation 5 (P. Wager ed. 1950) (("The office of sheriff has an unbroken lineage from the Anglo-Saxon *shire-reeve*"); 1 W. Anderson, A Treatise on the Law of Sheriffs, Coroners and Constables 5 (1941) ("In the exercise of executive and administrative functions, in conserving the public peace, in vindicating the law, and in preserving the rights of the government,he (the sheriff) represents the sovereignty of the State and he has no superior in his county"); R. Cooley, Handbook on the Law of Municipal Corporations 512 (1914) ("Sheriffs, coroners, clerks and other so-called county officers are properly state officers for the county. Their functions and duties pertain chiefly to the affairs of state in the county"); 3 J. Bouvier, Bouvier's Law Dictionary 3058 (8th ed. 1914) (defining sheriff as "[a] county officer representing the executive or administrative power of the state within his county").

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[8] See W. Murfree, A Treatise on the Law of Sheriffs and Other Ministerial Officers 6 (1890) (sheriffs elected by county voters in all States but two).

This historical sketch indicates that the common law itself envisioned the possibility that state law enforcement "policies" might vary locally, as particular sheriffs adopted varying practices for arresting criminals or securing evidence.[9] Thus, petitioner's disagreement with the concept that "county sheriffs" may actually be state officials is simply a disagreement with the ancient understanding of what it has meant to be a sheriff.

Petitioner's second concern is that under our holding here, sheriffs will be characterized differently in different States. But while it might be easier to decide cases arising under §1983 and *Monell* if we insisted on a uniform, national characterization for all sheriffs, such a blunderbuss approach would ignore a crucial axiom of our government: the States have wide authority to set up their state and local governments as they wish. Understandably, then, the importance of counties and the nature of county government have varied historically from region to region, and from State to State. See, *e.g.*, Wager, *supra*, at 5-8 (describing

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[9] Cf. *McMillian v. Johnson*, 88 F.3d, 1573, 1579 (CA11 1996) ("[W]e see no anomaly in having different state policymakers in different counties. Such a situation would be no different than if each of a city's police precinct commanders had unreviewable authority over how arrestees were processed. Each commander might have a different processing policy, but that does not render a commander's policy that of her precinct as opposed to that of the city when the city is sued under §1983").

different systems of rural government that developed in the Massachusetts, New York, Pennsylvania, and Virginia colonies, which later resulted in counties having widely varying roles in the four regions); Martin, American County Government, in County Governments in an Era of Change 3-5 (P. Berman ed. 1993) (same); DeSantis & Renner, Governing the County, *id.*, at 16-25 (describing varying levels of power currently exercised by counties in different States, and explaining how regional influences have resulted in different forms of county government in different States); Sokolow, Legislatures and Legislating in County Government, *id.*, at 37 (listing Alabama as 37th among the 50 States in amount of discretionary authority granted to its counties). Thus, since it is entirely natural that both the role of sheriffs and the importance of counties vary from State to State, there is no inconsistency created by court decisions that declare sheriffs to be county officers in one State, and not in another.[10]

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[10] Compare, *e.g.*, *Strickler v. Waters*, 989 F.2d 1375, 1390 (CA4 1993) (Virginia "city sheriff" does not set city policy in area of jail conditions); *Thompson v. Duke*, 882 F.2d 1180, 1187 (CA7 1989) (Illinois sheriff does not set county policy in area of training jail employees, because county board of commissioners has no authority to set policy in this area), with *Dotson v. Chester*, 937 F.2d 920, 926-928 (CA4 1991) (Maryland sheriff sets county policy in area of jail conditions, based on exhaustive survey of Maryland law; citing no constitutional provision to the contrary); *David v. Mason County*, 927 F.2d 1473, 1480

The final concern of petitioner and his *amici* is that state and local governments will manipulate the titles of local officials in a blatant effort to shield the local governments from liability. But such efforts are already foreclosed by our decision in *Praprotnik*. See 485 U.S., at 127 (plurality opinion) ("[E]gregious attempts by local governments to insulate themselves from liability for unconstitutional policies are precluded" by allowing plaintiffs to prove that "a widespread practice" has been established by "custom or usage' with the force of law"). And there is certainly no evidence of such manipulation here; indeed, the Alabama provisions that cut most strongly against petitioner's position predate our decision in *Monell* by some time.

The judgment of the Court of Appeals is therefore

Affirmed.

(CA9 1991) (Washington sheriff sets county policy in area of training deputy sheriffs, based on statutory provision labeling sheriff "chief executive officer...of the county"; citing no constitutional provision to the contrary (internal quotation marks omitted)); *Turner v. Upton County*, 915 F.2d 133, 136-137 (CA5 1990) (Texas sheriff sets county policy in area of law enforcement, based on "unique structure of county government in Texas"; citing no constitutional provision to the contrary (internal quotation marks omitted)); *Crowder v. Sinyard*, 884 F.2d 804, 828 (CA5 1989) (Arkansas sheriff sets county policy in area of law enforcement; citing no constitutional provision to the contrary).

JUSTICE GINSBURG, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE BREYER join, dissenting.

Petitioner Walter McMillian, convicted of capital murder, spent nearly six years on Alabama's Death Row. In 1993, the Alabama Court of Criminal Appeals determined that government officials, including the Sheriff of Monroe County, had concealed evidence of McMillian's innocence. Based on that evidence, the court overturned the conviction. The State thereafter dismissed all charges against McMillian and released him from prison.

Seeking redress for an arrest and years of incarceration in violation of his federal constitutional rights, McMillian commenced the instant action under 42 U.S.C. §1983. He named as defendants both Monroe County and the County's Sheriff, Tom Tate. McMillian alleged that Sheriff Tate withheld exculpatory evidence, generated false, inculpatory evidence, and subjected him to gross racial insults and relentless intimidation.

Sheriff Tate, it is uncontested, has "final policymaking authority" under Alabama law over matters of law enforcement in Monroe County. Our precedent instructs that, if the Sheriff makes policy for the State, Monroe County would not be accountable, under §1983, for that

policy; if, on the other hand, the Sheriff acts as law enforcement policymaker for Monroe County, then the County would be answerable under §1983. See *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 694 (1978).

In my view, Alabama law defining the office of sheriff indicates that the sheriff acts within and for the county when setting and implementing law enforcement policy.[1] In explaining why it concludes otherwise and deems the sheriff the State's, not the county's, policymaker, the Court leans heavily on provisions of the State's Constitution. The Court relies on the Alabama Constitution's designation of "a sheriff for each county" as a member of the State's "executive department." See Ala. Const., Art. V, §112; *ante*, at 5-6. In addition, the Court points to two 1901 amendments relating to the impeachment of sheriffs. See

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[1] The Court observes that this Court must "defer considerably" to the Eleventh Circuit's construction of Alabama law. See *ante*, at 5. But cf. *Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991) (courts of appeals review *de novo* district courts' state-law determinations). Deference, however, does not supplant careful review, see *St. Louis v. Praprotnik*, 485 U.S. 112, 129-130, 131-132 (1988) (plurality) (reversing Court of Appeals determination that certain city officials were municipal policymakers), and in any event, has little place here because the Court's reasoning differs substantially from that of the Eleventh Circuit.

ante, at 6-8. These measures are the strongest supports for the Court's classification of county sheriffs as state actors. They are not sturdy enough, however, to justify the Court's holding that county sheriffs are state officials.

Alabama law does not consistently designate sheriffs as "executive department" officers; instead, Alabama law in several instances refers to sheriffs as county officials. See *In re Opinion of the Justices*, 225 Ala. 359, 143 So. 345 (1932) (sheriffs are county officers for purposes of 1912 constitutional amendment regarding county officers' salaries); Ala. Code §36-3-4(a) (1991) (sheriff, a "county officer," shall be elected to four-year term); Ala. Code §36-22-16(a) (1991) (sheriffs shall be compensated out of the county treasury in same manner as "other county employees"). Moreover, designations Alabama attaches to sheriffs in its laws and decisions are not dispositive of a court's assessment of Sheriff Tate's status for §1983 purposes. Cf. *Regents of Univ. of Cal. v. Doe*, 519 U.S. ___, ___, n. 5 (1997) (slip op., at 4-5, n. 5); *Howlett v. Rose*, 496 U.S. 356, 376 (1990) (defenses to §1983 actions are questions of federal law); *Martinez v. California*, 444 U.S. 277, 284, and n. 8 (1980) (state law granting immunity to parole officers does not control question whether such officers have immunity under §1983). If a State's designation sufficed to answer the federal question at issue, "States would then be free to nullify for their own people the legislative decisions that Congress has made on behalf of all the People." *Howlett*, 496 U.S., at 383.

Nor are the 1901 impeachment measures secure indicators that a sheriff acts on behalf of the State, not the county. As the Court explains, the impeachment amendments were intended to provide a state check on county sheriffs in view of their glaring lapses in acquiescing to abductions and lynchings in the late 1800's. See *ante*, at 6-7. However, making an officer eligible for impeachment, by itself, does not change the governmental unit to which the officer belongs. See Ala. Const., Art. VII, §175 (listing numerous county officials subject to impeachment); Ala. Code §36-11-1(a) (1991) (same). And transferring impeachment proceedings from county courts to the State Supreme Court, see Ala. Const., Art. VII, §174, is sensibly seen as an acknowledgment of the power wielded by sheriffs within their own counties, and the consequent need for placement of removal authority outside of sheriff's bailiwick. Furthermore, impeachment of sheriffs is not a power reserved exclusively to state officials; "five resident taxpayers" of the sheriff's county can initiate an impeachment. See Ala. Code §36-11-6 (1991). Impeachment, in sum, provides an ultimate check on flagrant behavior, but does not serve as a tight control rein.

The prime controllers of a sheriff's service are the county residents, the people who select their sheriff at quadrennial elections. Sheriff Tate owes his position as chief law enforcement office of Monroe County to the county residents who elected him, and who can unseat him. See Ala. Const., Art. V, §138, as amended by Amdt. No.

35 ("A sheriff shall be elected in each county by the qualified electors thereof...."). On the ballot, candidates for the office of sheriff are grouped with candidates for other county offices, and are not listed with state office candidates. See Ala. Code §17-8-5 (1995).

Traditionally, Alabama sheriffs have had autonomy to formulate and execute law enforcement policy within the geographic confines of their counties. Under Alabama law, "[i]t shall be the duty of sheriffs *in their respective counties*...to ferret out crime, to apprehend and arrest criminals and...to secure evidence of crimes." Ala. Code §36-22-3(4) (1991) (emphasis added); see also Ala. Code §15-6-1 (1995) ("The sheriff is the principal conservator of the peach *in his county*, and it is his duty to suppress riots, unlawful assemblies and affrays. In the execution of such duty, he may summon to his aid as many of the men of his county as he thinks proper.") (emphasis added)' §15-10-1 (sheriffs may make arrests "within their respective counties").

Monroe County pays Sheriff Tate's salary, see Ala. Code §36-22-16(a) (1991) (sheriffs shall be paid "out of the county treasury as the salaries of other county employees are paid"), and the sheriff operates out of an office provided, furnished, and equipped by the county, see §36-22-18. The obligation to fully equip the sheriff is substantial, requiring a county commission to "furnish the sheriff with the necessary quarters, books, stationery, office

equipment, supplies, postage and other conveniences and equipment, including automobiles and necessary repairs, maintenance and all expenses incidental thereto." *Ibid.* These obligations are of practical importance, for they mean that purse strings can be pulled at the county level; a county is obliged to provide a sheriff only what is "*reasonably needed* for the proper and efficient conduct of the affairs of the sheriff's office," *ibid.* (emphasis added). How generously the sheriff will be quipped is likely to influence that officer's day to day conduct to a greater extent than the remote prospect of impeachment. See *ibid.*, see also *Geneva Cty Comm'n v. Tice*, 578 So. 2d 1070, 1075 (ala. 1991) (county may reasonably limit budget for overtime pay for sheriff's deputies); Ala. Code §36-22-16(a) (1991) (sheriff's salary, paid by county, may be increased "by law by general or local act"); §36-22-3(3) (sheriff must render to county treasurer a periodic written statement of moneys collected by sheriff on behalf of county).

Sheriff Tate, in short, is in vital respects a county official. Indeed, one would be hard-pressed to think of a single official who more completely represents the exercise of significant power within a county. See *Pembaur v. Cincinnati*, 746 F.2d 337, 340-341 (CA6 1984) (sheriff elected by residents of county to be county's chief law enforcement officer, paid and equipped by county, is "obvious[ly]" a county official), rev'd on other grounds,

475 U.S. 469 (1986).[2]

The Court observes that it is "most importan[t]" to its holding that Alabama sheriffs "are given complete authority to enforce the state criminal law in their counties." See *ante*, at 9. If the Court means to suggest that Sheriff Tate should be classified as a state actor because he is enforcing *state* (as opposed to county or municipal) law, the Court proves far too much. Because most criminal laws are of statewide application, relying on whose law the sheriff enforces yields an all-state categorization of sheriffs, despite the Court's recognition that such blanket classification is inappropriate. See *ante*, at 4-5. Sheriffs in Arkansas,

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[2] The majority of Courts of Appeals to have addressed this question have similarly concluded that sheriffs, when engaged in a variety of activities, are county actors. See, *e.g.*, cases cited *ante*, at 15, n. 10; see also *Parker v. Williams*, 862 F.2d 1471, 1477-1481 (CA11 1989) (Alabama sheriff acts for county in hiring chief jailor); *Lucas v. O'Loughlin*, 831 F.2d 232, 234-235 (CA11 1987) (Florida sheriff acts for county in hiring and firing deputies); *Weber v. Dell*, 804 F.2d 796, 802-803 (CA2 1986) (New York sheriff acts for county in setting county jail strip search policy); *Marchese v. Lucas*, 758 F.2d 181, 188-189 (CA6 1985) (Michigan sheriff acts for county in training deputies and ratifying deputies' use of force); *Blackburn v. Snow*, 771 F.2d 556, 571 (CA1 1985) (Massachusetts sheriff acts for county in setting county jail strip search policy). But see *Soderbeck v. Burnett*, 821 F.2d 446, 451-452 (CA7 1987) (Wisconsin sheriff acts on behalf of State, not county, in hiring and firing employees).

Texas, and Washington, just like sheriffs in Alabama, enforce the State's law, but that does not make them policymakers for the State rather than the county. See *ante*, at 15, n. 10.

In emphasizing that the Monroe County Commission cannot instruct Sheriff Tate how to accomplish his law enforcement mission, see *ante*, at 9, the Court indirectly endorses the Eleventh Circuit's reasoning: Because under Alabama law a county commission does not possess law enforcement authority, a sheriff's law enforcement activities cannot represent county policy. See *McMillian v. Johnson*, 88 F.3d 1573, 1578 (CA11 1996). There is an irony in this approach: If a county commission lacks law enforcement authority, then the sheriff becomes a state official; but if a county commission possesses such authority and directs the sheriff's activities, then the sheriff presumably would not be a *final* policymaker in the realm of law enforcement, se *St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (plurality).

Moreover, in determining who makes county policy, this Court has never reasoned that all policymaking authority must be vested in a single body that either exercises that power or formally delegates it to another. Few local governments would fit that rigid model. Cf. *id.*, at 124-125 ("The States have extremely wide latitude in determining the form that local government takes....[O]ne may expect to find a rich variety of ways in which the power of government is distributed among a host of different officials

and official bodies."). Nor does *Monell* support such a constricted view of the exercise of municipal authority; there, we spoke of §1983 liability for acts by "lawmakers *or* by those whose edicts or acts may fairly be said to represent official policy." 436 U.S., at 694 (emphasis added). In this case, Sheriff Tate is "the county's final policymaker in the area of law enforcement, not by virtue of delegation by the county's governing body but, rather, by virtue of the office to which the sheriff has been elected." *Turner v. Upton Cty.*, 915 F.2d 133, 136 (CA5 1990); see also *Blackburn v. Snow*, 771 F.2d 556, 571 (CA1 1985); accord, *Vera v. Tue*, 73 F.3d 604, 609 (CA5 1996) ("[T]he Sheriff, an elected county official [in Texas], had equal authority to the county commissioners in that jurisdiction [so] that his actions constituted those of the county just as much as those of the commissioners."). An Alabama sheriff is a county policymaker because he independently exercises law enforcement authority for the county. In this most crucial respect, the Alabama arrangement resembles the "unique structure of county government" in Texas. See *Turner*, 915 F.2d, at 136-137, cited *ante*, at 15 n. 10.

The Court also suggests that because the Governor can direct a sheriff to investigate a violation of law in the county, an Alabama sheriff must be a state, not a county, official. See *ante*, at 10 (citing Ala. Code §36-22-5 (1991)). It is worth noting that a group of county citizens can likewise trigger an investigation by the sheriff. See §36-22-6(b). The respondent, Monroe County, did not

perform us whether the Governor directs county sheriffs to conduct investigations with any regularity. More important, there is no suggestion that Sheriff Tate was proceeding under the Governor's direction when Tate pursued the investigation that led to McMillian's Death Row confinement. If Sheriff Tate were acting on instruction from the Governor, this would be a very different case. But the bare possibility that a Governor might sometime direct a sheriff's law enforcement activities does not lessen the sheriff's authority, as the final county policymaker, in the general run of investigations the sheriff undertakes.

The Court's reliance on "the ancient understanding of what it has meant to be a sheriff," *ante*, at 14, is no more persuasive than its interpretation of Alabama law. This emphasis on the historical understanding of the office of sheriff implies, again, an all-state categorization of sheriffs throughout the Nation; but because the Court expressly disclaims such a "blunderbuss" approach, *ibid.*, that cannot be what this history lesson is intended to convey. In England, it is true, the sheriff did perform "the king's business in the county." 1 W. Blackstone, Commentaries *339. But the English sheriff, a Blackstone described him, was far closer to the crown than his contemporary counterpart is to the central state government. While sheriffs were for a time chosen locally, "[t]his election," according to Blackstone, "was in all probability not absolutely vested in the [inhabitants of the counties], but required the royal approbation." *Id.*, at *340. Eventually,

the king chose the sheriff from a list proposed by the judges and other great officers. See *Id.*, at *340-*341.

Whatever English history may teach, "[t]hroughout U.S. history, the sheriff has remained the principal law enforcement officer in the county." G. Felkenes, The Criminal Justice System: Its Functions and Personnel 53 (1973); see *Id.*, at 52-53 (referring specifically to Alabama sheriffs). In the United States, "[i]n order to reserve control over the sheriff's department and its police functions, the people made the sheriff an elective officer." *Id.*, at 53. It is this status as the county's law enforcement officer chosen by the county's residents that is at the root of the contemporary understanding of the sheriff as a county officer.

* * *

A sheriff locally elected, paid, and equipped, who autonomously sets and implements law enforcement policies operative within the geographic confines of a county, is ordinarily just what he seems to be: a county official. Nothing in Alabama law warrants a different conclusion. It makes scant sense to treat sheriffs' activities differently based on the presence or absence of state constitutional provisions of the limited kind Alabama has adopted.

The Court's Alabama-specific approach, however, assures that today's immediate holding is of limited reach.

The Court does not appear to question that an Alabama sheriff may still be a county policymaker for some purposes, such as hiring the county's chief jailor, see *Parker v. Williams*, 862 F.2d 1471, 1477-1481 (CA11 1989). And, as the Court acknowledges, under its approach sheriffs may be policymakers for certain purposes in some States and not in others. See *ante*, at 14-15, and n. 10. The Court's opinion does not call into question the numerous Court of Appeals decisions, some of them decades old, ranking sheriffs as county, not state, policymakers. Furthermore, the Court's recognition of the historic reasons why Alabama listed sheriffs as members of the State's "executive department," see *ante*, at 6-7, should discourage endeavors to insulate counties and municipalities from *Monell* liability by change-the-label devices. Thus, the Court's opinion, while in my view misguided, does little to alter §1983 county and municipal liability in most jurisdictions.

BRYAN A. STEVENSON, Montgomery, Ala. (RANDALL S. SUSSKIND and ROBERT B. MCDUFF, on the briefs) for petitioner PAUL M. SMITH, Washington, D.C. (DARYL L. MASTERS, KENDRICK E. WEBB, BART HARMON, and WEBB & ELEY P.C., on the briefs) for respondent.

APPENDIX BB

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

NOTICE OF APPEAL

Case No. 1:90 CV 2243
Filed September 28, 1995

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID M. MUMFORD, *Plaintiffs*,	)	Case No. 1:90CV 2243
vs.	)	Judge Peter C. Economus
JOSEPH C. ZIEBA, et al. *Defendants*.	)	Notice of Appeal

Notice is hereby given that the plaintiff, David M. Mumford, appeals to the United States Court of Appeals for the Sixth Circuit from the judgement entered in favor of defendants by the trial court in its judgement entry filed on September 28, 1995. A copy of this judgement is attached as Exhibit A.

/s/DENNIS J. NIERMANN (0007988)
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KRAMER & NIERMANN, LPA
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SERVICE

Pursuant to Local Rule 5:3.3 of the United States District Court, Northern District of Ohio, the following are the current names and addresses for counsel of record for all parties (other than the appellants) for service of a copy of the foregoing **Notice of Appeal** of the plaintiff, David M. Mumford, by the Clerk of Court:

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Supreme Court, U.S.
FILED
SEP 8 1997
CLERK

(3)

No. 97-243

In The

Supreme Court of the United States

October Term, 1996

DAVID M. MUMFORD,

Petitioner,

vs.

DAVID A. BASINSKI,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT JUDGE DAVID A. BASINSKI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the First Amendment prohibit the patronage dismissal of a domestic relations court referee employed by a state common pleas court?

2. Does the Eleventh Amendment bar an official capacity claim against a state common pleas court judge which seeks redress under 42 U.S.C. § 1983?

PARTIES TO THE PROCEEDING

Petitioner, David M. Mumford, hereinafter "Mumford", filed suit pursuant to 42 U.S.C. § 1983 against the Honorable Joseph C. Zieba, in his individual and official capacities, and the Lorain County, Ohio Court of Common Pleas, Domestic Relations Division following Judge Zieba's termination of Mumford's employment as a domestic relations court referee.

The claims against the Domestic Relations Court were dismissed because the Domestic Relations Court was not a "person" for purposes of § 1983. *Mumford v. Zieba*, 4 F.3d 429 (6th Cir. 1993). The individual capacity claim against Judge Zieba was dismissed on the basis of qualified immunity. *Id.*

After the official capacity claim was remanded for trial, Judge Zieba retired; and the Honorable David A. Basinski was substituted as the new party defendant pursuant to Rule 25 of the Federal Rules of Civil Procedure.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	iii
Opinions Below	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	1
Reasons For Denying The Writ	6
I. The First Amendment Does Not Prohibit The Patronage Dismissal Of A Domestic Relations Court Referee.	6
II. The Eleventh Amendment Bars A § 1983 Claim Against A State Common Pleas Court Judge.	13
Conclusion	17

TABLE OF CITATIONS

Cases Cited:

Arlinghaus v. Ritenour, 622 F.2d 629 (2d Cir. 1980)	6

Contents

Page

Blair v. Meade, 76 F.3d 97 (6th Cir. 1996) 8

Boykin v. District of Columbia, 689 F.2d 1092 (D.C. Cir. 1982) 6

Branti v. Finkel, 445 U.S. 507, 100 S. Ct. 1287 (1980) 7, 8, 10, 11

Dandridge v. Williams, 397 U.S. 471, 90 S. Ct. 1153 (1970) 6

David M. Mumford v. David A. Basinski, et al. Case Number 1:96CV2182 ..... 5, 8

Eggar v. City of Livingston, 40 F.3d 312 (9th Cir. 1994) 15

Elrod v. Burns, 427 U.S. 347, 96 S. Ct. 2673 (1976) .. 7, 11

Faughender v. City of North Olmsted, 927 F.2d 909 (6th Cir. 1991) 7, 11

Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459, 65 S. Ct. 347 ..... 13, 14

Foster v. Walsh, 864 F.2d 416 (6th Cir. 1985) 15

Franceshi v. Schwartz, 57 F.3d 828 (9th Cir. 1995) ... 15

Garretto v. Cooperman, 510 F. Supp. 816 (S.D.N.Y. 1981) 8

Contents

	Page
Giglio v. Supreme Court of Pennsylvania, 675 F. Supp. 266 (M.D. Pa. 1987)	15
Greater Los Angeles Council On Deafness, Inc. v. Zolin, 812 F.2d 1103 (9th Cir. 1987)	15
Hawkins v. Steingut, 829 F.2d 317 (2d Cir. 1987)	8
Holloway v. Walker, 765 F.2d 517 (5th Cir. 1985), *cert. denied*, 474 U.S. 1037, 106 S. Ct. 605 (1985)	14, 15
Jett v. Dallas Independent School District, 491 U.S. 701, 109 S. Ct. 2702 (1989)	14
Mayor of the City of Philadelphia v. Educational Equality League, 415 U.S. 605, 94 S. Ct. 1323 (1974)	4
McCloud v. Testa, 97 F.3d 1536 (6th Cir. 1996)	11
McMillian v. Monroe County, Alabama, __ U.S. __, 117 S. Ct. 1734 (1997)	15, 16
Meeks v. Grimes, 779 F.2d 417 (7th Cir. 1985)	10
Mumford v. Basinski, 105 F.3d 264 (6th Cir. 1997)	1, 4, 5, 6, 9, 10, 11, 13, 14, 15, 16
Mumford v. Zieba, 4 F.3d 429 (6th Cir. 1993)	ii, 4, 8, 9, 13
Mumford v. Zieba, 788 F. Supp. 987 (N.D. Ohio 1992), *rev'd*, 4 F.3d 429 (6th Cir. 1993)	3, 13

Contents

	Page
Mumford v. Zieba, 915 F. Supp. 917 (N.D. Ohio 1995)	4
O'Connor v. Nevada, 686 F.2d 749 (9th Cir. 1982), *cert. denied*, 459 U.S. 1071, 103 S. Ct. 491 (1982)	15
O'Hare Truck Service, Inc. v. City of Northlake, __ U.S. __, 116 S. Ct. 2353 (1996)	11
Owens v. Fulton County, 877 F.2d 947 (11th Cir. 1989)	14
Pennhurst State School & Hosp. v. Halderman, 465 U.S. 100, 104 S. Ct. 900 (1984)	13, 14
Rice v. Ohio Dept. of Transp., 14 F.3d 1163 (6th Cir. 1994)	7, 8
Roldan-Plumey v. Cerezo-Saurez, 115 F.3d 58 (1st Cir. 1997)	9, 10
Rutan v. Republican Party of Illinois, 497 U.S. 62, 110 S. Ct. 2729 (1990)	7, 11
United States v. General Motors Corporation, 518 F.2d 420 (D.C. Cir. 1975)	6
Warnock v. Pecos County, Texas, 88 F.3d 341 (5th Cir. 1996)	15
Williams v. City of River Rouge, 909 F.2d 151 (6th Cir. 1990)	8

Contents

Page

Statutes Cited:

42 U.S.C. § 1983 ..... i, ii, 1, 4, 5, 13, 15, 16

Ohio Revised Code § 124.11 2

Ohio Revised Code § 2151.13 2

Rule Cited:

Federal Rule of Civil Procedure 25 ii

United States Constitution Cited:

First Amendment ..... i, 1, 3, 4, 5, 6, 8, 11, 13, 17

Eleventh Amendment ..... i, 1, 4, 5, 13, 14, 15, 16, 17

Fourteenth Amendment 1

APPENDIX

Appendix A — Memorandum of Opinion of the United States District Court for the Northern District of Ohio, Eastern Division Filed July 31, 1997 ..... 1a

OPINIONS BELOW

Mumford is requesting this Court to review the decision of *Mumford v. Basinski*, 105 F.3d 264 (6th Cir. 1997), which held that the position of domestic relations court referee was not, as a matter of law, accorded First Amendment protection against a patronage dismissal; and that for purposes of § 1983, the Eleventh Amendment barred an official capacity claim against a state court judge.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This action involves the application of the First, Eleventh and Fourteenth Amendments to the United States Constitution, as well as 42 U.S.C. § 1983.

STATEMENT OF THE CASE

Between January 22, 1979 and January 2, 1989, Mumford was a referee employed by the Lorain County, Ohio Court of Common Pleas, Domestic Relations Division, hereinafter "Domestic Relations Court", in Elyria, Ohio. During this time period, Mumford, a registered democrat, was appointed to this position by the Honorable Henry T. Webber, a registered democrat.

In the Fall of 1988, then Candidate Zieba, a registered republican, ran for Judge Webber's Domestic Relations Court judgeship because, in Candidate Zieba's opinion, the Domestic Relations Court was not serving the public interest. Judge Henry T. Webber, and his father, Judge Henry P. Webber, a registered democrat, had controlled the Domestic Relations Court from its inception in the 1950's. Candidate Zieba felt it was time for a change in court administration and philosophy through new

leadership and direction. To this end, Candidate Zieba, during his campaign, *inter alia*, promised the electorate that he would "clean house" if elected. Upon being elected, Judge-Elect Zieba kept his campaign promise and cleaned house.[1]

By correspondence dated December 23, 1988, Judge-Elect Zieba advised Mumford that he would not be employed by the Domestic Relations Court after January 2, 1989, the date on which Judge-Elect Zieba's six (6) year if office term commenced.[2]

As was established by Judge Zieba, political considerations were not the substantial or motivating factors in the decision to terminate Mumford's employment. Judge Zieba was primarily concerned about Mumford's lack of competence, diligence and suitability to perform the job of a domestic relations court referee. Given these concerns, Judge Zieba preferred to appoint key employees of his own selection rather than maintain the status quo with a key employee that had been appointed by Judge Webber, which employee's job performance and ability was extremely suspect and very questionable. When the totality of the circumstances were considered, Judge Zieba was not comfortable with retaining Mumford's services and felt that it would be in the Domestic Relations Court's best interests to terminate Mumford's employment.

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1. Mumford was the only Webber loyalist who contested the constitutionality of his dismissal.

2. Under Ohio law, Mumford was an unclassified civil servant who served at the pleasure of the administrative judge. (Ohio Revised Code §§ 124.11 and 2151.13; and Ohio Attorney General Opinion Number 76-031). In other words, Mumford was an employee-at-will; and did not have any protected property interest in continued employment as a domestic relations court referee.

In retrospect, Judge Zieba's grave concerns proved to be well-founded. During discovery, Mumford produced his income tax returns and correspondence he mailed to some six hundred (600) prospective employers. The documents produced by Mumford revealed that Mumford never practiced law following his 1989 termination; and that Mumford did not obtain comparable employment. Needless to say, Mumford's employment history following his 1989 termination leaves much to be desired, and begs the question about Mumford's suitability and fitness for employment in the first instance. As of this writing, Mumford is still voluntarily unemployed.

On December 17, 1990, Mumford filed a civil rights lawsuit against Judge Zieba and the Domestic Relations Court alleging, *inter alia*, that Judge Zieba's termination of Mumford's employment as a domestic relations court referee violated his First Amendment constitutional rights because Mumford supported Judge Zieba's political opponent, the incumbent Judge Henry T. Webber, in the 1988 general election for one (1) of the two (2) Domestic Relations Court judgeships. Judge Zieba was sued in both his official capacity and in his individual capacity.[3] Both Judge Zieba and the Domestic Relations Court denied violating Mumford's civil rights.

Judge Zieba moved to dismiss the individual capacity suit on the basis of qualified immunity. The district court denied Judge Zieba's motion for summary judgment [*Mumford v. Zieba*, 788 F. Supp. 987 (N.D. Ohio 1992)]; and a qualified immunity appeal followed.

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3. It is important to note that Mumford did not sue Lorain County, Ohio, the Board of Commissioners of Lorain County, Ohio or Judge Basinski, the other Domestic Relations Court Judge who was also elected in November of 1988.

On appeal, in *Mumford I*, the Sixth Circuit ruled that Judge Zieba was qualifiedly immune from suit with respect to the individual capacity claim; and that the Domestic Relations Court was not a "person" for purposes of 1983. *Mumford v. Zieba*, 4 F.3d 429 (6th Cir. 1993). Without specifically addressing the issue of whether or not a referee enjoyed First Amendment protection against a patronage dismissal, the court remanded Mumford's official capacity claim for trial. (*Id.*)

Thereafter, in 1994, Judge Basinski was substituted as the new party defendant following Judge Zieba's mandatory age-related retirement. While cross-motions for summary judgment were pending, Judge Basinski moved the district court to dismiss Mumford's official capacity claim because the change in administrations mooted Mumford's Complaint. Relying upon the authority of *Mayor of the City of Philadelphia v. Educational Equality League*, 415 U.S. 605, 94 S. Ct. 1323 (1974), the district court dismissed the remaining official capacity claim on the basis of mootness. *Mumford v. Zieba*, 915 F. Supp. 917 (N.D. Ohio 1995).[4] Mumford appealed the mootness dismissal of the official capacity claim.

In *Mumford II*, the Sixth Circuit, while disagreeing with the district court's mootness analysis, nonetheless affirmed the dismissal of Mumford's Complaint because the First Amendment does not prohibit a patronage dismissal of a domestic relations court referee; and because the Eleventh Amendment prohibits an official capacity § 1983 claim against a state common pleas court judge because a state common pleas court judge is a "state" actor for § 1983 liability and Eleventh Amendment immunity analyses. *Mumford v. Basinski*, 105 F.3d 264 (6th Cir. 1997).

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4. The district court did not rule upon the cross-motions for summary judgment before it dismissed Mumford's Complaint.

A week after oral arguments in *Mumford II*, Mumford filed another patronage dismissal lawsuit against Judge Basinski. In the case of *David M. Mumford v. David A. Basinski, et al.*, United States District Court, Northern District of Ohio, Eastern Division, Case Number 1:96CV2182, Mumford alleged that Judge Basinski violated Mumford's First Amendment rights in 1994 when Judge Basinski did not re-hire Mumford as a Domestic Relations Court IV-D Referee. Mumford's second attempt to obtain court-ordered employment with the Domestic Relations Court failed because Mumford did not sue Judge Basinski within the applicable statute of limitations, because referees are not within the ambit of the First Amendment's protection against patronage dismissal and because Eleventh Amendment immunity precludes a § 1983 claim against a state court judge. (July 31, 1997 Memorandum of Opinion, *Mumford v. Basinski*, United States District Court, Northern District of Ohio, Eastern Division, Case Number 1:96CV2182, Appendix, pp. 1a–5a).

As set forth below, the Sixth Circuit, consistent with applicable Supreme Court precedent, properly determined that the position of referee was not protected from a patronage dismissal; and that a state court judge was a state actor, who, in his official capacity, was not amendable to suit under 42 U.S.C. § 1983. The case of *Mumford v. Basinski*, 105 F.3d 264 (6th Cir. 1997) does not present any questions of national importance; and does not conflict with any other circuit court decision involving the same or similar issue so as to warrant any further review by this Court.

REASONS FOR DENYING THE WRIT

I.

THE FIRST AMENDMENT DOES NOT PROHIBIT THE PATRONAGE DISMISSAL OF A DOMESTIC RELATIONS COURT REFEREE.

A fortia, Mumford argues that the Sixth Circuit erroneously reached the First Amendment issue because he only appealed the district court's mootness dismissal. (Petition for Writ of Certiorari, pp. 4, 5, 6). On appeal, a party is permitted to advance any argument in support of the district court's judgment even though the advanced argument did not form the basis of the lower court's decision. *Dandridge v. Williams*, 397 U.S. 471, 90 S. Ct. 1153 (1970); *Arlinghaus v. Ritenour*, 622 F.2d 629 (2d Cir. 1980); *United States v. General Motors Corporation*, 518 F.2d 420 (D.C. Cir. 1975); and *Boykin v. District of Columbia*, 689 F.2d 1092 (D.C. Cir. 1982). The unprotected nature of Mumford's position was specifically raised in the district court; thus, the First Amendment issue was properly considered by the Sixth Circuit even though Mumford specifically requested the Sixth Circuit to limit the scope of *Mumford II* to the district court's mootness ruling. The Sixth Circuit's refusal to limit the scope of *Mumford II* was not an abuse of discretion; and is not a basis for granting Mumford's Petition for [a] Writ of Certiorari.

In his Complaint, Mumford alleged that he was unconstitutionally terminated for political reasons. While this allegation has been vehemently denied and disputed below, solely for purposes of the within proceeding for a writ of certiorari, Mumford's allegation will not be disputed.[5]

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5. The failure to dispute this allegation, solely for purposes of this proceeding, is not to be construed as an admission of same.

While there is a general ban on patronage dismissals of public employees, *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S. Ct. 2729 (1990), this prohibition does not extend to key, confidential, policy-making positions, *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673 (1976), or to positions where party affiliation is an appropriate job requirement. *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287 (1980). Although this Court's decisions in *Elrod* and *Branti* protect rank and file government employees from adverse personnel action based on patronage considerations, federal courts have recognized a substantial number of exceptions to this rule because political considerations, either in the sense of political affiliation or personal loyalty, are appropriate for the performance of the job in question. *See, e.g., Rice v. Ohio Dept. of Transp.*, 14 F.3d 1163, 1141, n. 7 (6th Cir. 1994).

The *Rice* court, after reviewing the development of case law under the *Elrod/Branti* exception that permits the consideration of patronage with respect to politically sensitive and confidential positions, determined that political considerations were "appropriate" in the decision to employ an administrative assistant. *Rice v. Ohio Dept. of Transp.*, 14 F.3d 1163, 1143 (6th Cir. 1994). Referring to its decision in *Faughender v. City of North Olmsted, Ohio*, [927 F.2d 909 (6th Cir. 1991)], the *Rice* court stated:

> . . . the test is not whether party affiliation and support are essential to the effective performance of the public office involved; the test, under *Branti*, is whether these are "appropriate" requirements. The outer limits of what is appropriate are now subject to determination by the courts, but within those limits, surely, the judgment of the people's elected representatives merits

> respect. This is the lesson of *Faughender*, where we held that the mayor was entitled to decide for herself whether to give her secretary political responsibilities that would justify appointment on a political basis.

Rice v. Ohio Dept. of Transp., 14 F.3d 1133, at 1142 (6th Cir. 1994).[6]

The *Branti* "party affiliation" standard is met when there is a relationship of "confidence and trust" between employer and employee. *Williams v. City of River Rouge*, 909 F.2d 151 (6th Cir. 1990). Moreover, when a newly elected official makes personnel changes, the judgment of the people's elected representative, *i.e.*, Judge Zieba, merits respect by a reviewing court. *Rice v. Ohio Dept. of Transp.*, *supra*.

There are only four (4) reported cases that have addressed the issue of whether or not a referee can be terminated for purely political reasons. Each of theses cases are adverse to Mumford, as is the unreported case of *Mumford v. Basinski,* Case Number 1:96CV2182, Appendix, pp. 1a-5a. In *Garretto v. Cooperman*, 510 F. Supp. 816 (S.D.N.Y. 1981), the court determined that a workers' compensation referee **could be terminated** for political reasons because the referee was a policy-maker. Similarly, in *Hawkins v. Steingut*, 829 F.2d 317 (2d Cir. 1987), the court ruled, as a matter of law, that a state court referee **did not have a clearly established constitutional right** not to be terminated for political reasons. The Sixth Circuit, in *Mumford I*, clearly suggested that the First Amendment did not protect a referee from a patronage dismissal. *Mumford v. Zieba*, 4 F.3d 429, 435

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6. *Cf.*, *Blair v. Meade*, 76 F.3d 97, 101 (6th Cir. 1996), wherein the court cautioned against allowing "... a prior judge executive to define for his successors how the office is run. Such a rule would hamper the new administration's ability to implement its policies".

(6th Cir. 1993). When the patronage issue was directly addressed in *Mumford II*, the Sixth Circuit stated:

> [i]n *Mumford v. Zieba*, 4 F.3d 429, 433 (6th Cir., 1993), [the] court . . . clearly *implied* that a court referee, of necessity, had a confidential relationship with the judge whom he served, which transformed political affiliation into an appropriate employment consideration.

Mumford v. Basinski, 105 F.3d 264, 271 (6th Cir. 1997). (Emphasis in original). After analyzing the inherent positions and duties of a domestic relations court referee, the Sixth Circuit concluded that:

> . . . Mumford's former position as referee for the Domestic Relations Court was an inherently political post which was not safeguarded from political patronage termination by the First Amendment, and therefore, [Mumford's] official capacity claim under section 1983 must by rejected.

Mumford v. Basinski, 105 F.3d 264, 273 (6th Cir. 1997).

Mumford's reliance on *Roldan-Plumey v. Cerezo-Saurez*, 115 F.3d 58 (1st Cir. 1997), so as to create a circuit court conflict, is misguided. (Petition for Writ of Certiorari, pp. 9, 23). The "hearing examiner" in *Roldan-Plumey* was only charged with the responsibility of uncovering, investigating and reporting municipal wrong-doing to the city's mayor such that the mayor would be in a position to take appropriate disciplinary action, if warranted. This "hearing examiner" position is more akin to a police department internal affairs investigator than it is to the

position of a domestic relations court referee. In contrast, a domestic relations court referee, the judge's alter ego, is entrusted with much greater responsibility, autonomy and discretionary authority. A referee presides over contested and adversarial judicial proceedings. Domestic relations court referees initially determine which parent has temporary custody of a child and establishes visitation rights for the non-custodial parent. There is a very significant difference between a "hearing examiner" who determines, for example, that a municipal employee has abused sick time, and a domestic relations court referee who determines what is in the best interests of a child as regards custody and visitation. Likening the *Roldan-Plumey* hearing examiner to a domestic relations court referee is an improper comparison of apples and oranges. Even the court noted that the hearing examiner's position was of a "quasi-adjudicative nature that did not even require the officer holder to possess a law degree", let alone be admitted to the practice of law. *Roldan-Plumey v. Cerezo-Saurez*, 115 F.3d 58, 64 (1st Cir. 1997).

The only other conflicting circuit decision relied upon by Mumford, *Meeks v. Grimes*, 779 F.2d 417 (7th Cir. 1985), is inapposite as well. (Petition for Writ of Certiorari, pp. 9, 21). In *Meeks*, the First Circuit determined that a judge's **bailiff** was not a confidential employee. The instant case involves the position of a domestic relations court **referee**.

In *Mumford II*, the Sixth Circuit examined, as a matter of law, the inherent duties of a domestic relations court referee [much like this Court did in *Branti v. Finkel*, 445 U.S. 507, 518, 519, 100 S. Ct. 1287, 1295 (1980) when it was determined, as a matter of law, that political affiliation was not an appropriate requirement in the continued employed of an assistant county public defender]; and concluded that political considerations were appropriate considerations in the employment of a referee

given the personal confidential relationship, *inter alia*, between a referee and the judge(s) which he serves. *Mumford II* at pp. 271, 272.

Citing *O'Hare Truck Service, Inc. v. City of Northlake*, __ U.S. __, 116 S. Ct. 2353 (1996), Mumford misleads this Court when he argues that an analysis of whether or not political considerations are appropriate is a "fact based application". (Petition for Writ of Certiorari, pp. 19, 20). Rather than a fact based application, this Court consistently focuses upon the nature of the position or the public office involved, as opposed to duties that were actually performed by the plaintiff or his successors. *Branti*, 445 U.S. at 518, 100 S. Ct. at 1295.[7] The majority opinions in *Elrod*, *Branti* and *Rutan* do not mandate a fact based application or determination.

As noted *supra*, this Court in *Branti* determined, as a matter of law, that public defenders were protected from patronage dismissals. In *O'Hare*, this Court, as a matter of law, extended First Amendment protection to municipal vendors (tow truck operators). In short, the analysis employed by the Sixth Circuit, including its consideration of the categories outlined in *McCloud v. Testa*, 97 F.3d 1536 (6th Cir. 1996), complied with this Court's pronouncements in *Elrod*, *Branti*, *Rutan* and *O'Hare*.

The present case involves the judicial branch. The sphere of activities is the administration of justice — the operation of a domestic relations court and juvenile court in an urban county. In the universe of the Domestic Relations Court, referees are high level employees. Compensation rates alone reflect the levels of qualification, responsibility and status among the many Domestic Relations Court positions. Excluding Judge Webber,

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7. *Cf.*, *Faughender v. City of North Olmsted*, 927 F.2d 909 at 912, 913 (6th Cir. 1991), and cases cited therein.

Mumford, as the Chief Referee, was the third most highly compensated court employee prior to his termination.

During 1989, the Domestic Relations Court had jurisdiction over 5,083 domestic relations cases, finalizing 3,847. During the same year, 6,811 juvenile cases were filed. The Domestic Relations Court conducted 14,872 hearings on juvenile matters. The Domestic Relations Court also disbursed approximately Twenty Five Million Dollars ($ 25,000,000) of child/spousal support payments in approximately 20,000 cases. Two elected judges could not possibly handle this caseload without the assistance of competent, loyal and trustworthy referees.

Within the hierarchy of the Domestic Relations Court, with its staff of 190 individuals, the referees, particularly Chief Referee Mumford, were key personnel in the operation of the Domestic Relations Court. Referees exercised substantial authority and independence while discharging the duties of the Domestic Relations Court, both in terms of handling the overall case load and the adjudication of specific disputes. Although the Judges of the Domestic Relations Court are the primary policymakers, the referees are communicators who are in a position to control the flow of information to the judges; who are in a position to have meaningful input on policy issues; and who, through their independent actions (scheduling, conducting hearings and deciding disputed issues), are responsible for interpreting and implementing policies. To an elected judge of the Domestic Relations Court, and to the public, referees occupied a key position in the administration of justice. Referees dealt face to face with the voting public. Their performance was politically sensitive.

Since referees were employees-at-will serving at the pleasure of the administrative judge, it was entirely appropriate for Judge Zieba to fill a referee position with an individual whom

he had confidence in and whom he trusted. Given the importance and the sensitivity of the position of domestic relations court referee, it was appropriate for Judge Zieba to consider Mumford's loyalties, as well as his professional competence or lack thereof, in making a decision whether or not to reappoint Mumford. The Sixth Circuit properly determined that political considerations are relevant in the decision to employ a domestic relations court referee.

Finally, Mumford's undying allegiance to Judge Krenzler's opinion in *Mumford v. Zieba*, 788 F. Supp. 987 (N.D. Ohio 1992), *rev'd*, 4 F.3d 429 (6th Cir. 1993), is foolish. (Petition for Writ of Certiorari, pp. 3, 4). Judge Krenzler's erroneous legal rulings were reversed and remedied by the Sixth Circuit in *Mumford I* and *Mumford II*; and are of no further precedental value.

In conclusion, the Sixth Circuit properly decided the First Amendment issue in accordance with existing Supreme Court precedent. There are no conflicting circuit court opinions which justify the grant of a writ of certiorari. The ruling below should not be disturbed.

II.

THE ELEVENTH AMENDMENT BARS A § 1983 CLAIM AGAINST A STATE COMMON PLEAS COURT JUDGE.

The Eleventh Amendment prohibits a federal court from entertaining a suit brought against a state unless a state has waived its sovereign immunity. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 100, 104 S. Ct. 900 (1984). This explicit limitation is so compelling that an Eleventh Amendment sovereign immunity defense can be raised, even for the first time, before this Court. *Pennhurst*, *supra*; and *Ford Motor Co.*

v. Department of Treasury of Indiana, 323 U.S. 459, 65 S. Ct. 347. As this Court noted:

> [a] federal court must examine each claim in a case to see if the court's jurisdiction is barred by the Eleventh Amendment.

Pennhurst, 465 U.S. at 121, 104 S. Ct. at 919.

Courts may *sua sponte* consider the applicability of Eleventh Amendment immunity. *See, e.g., Holloway v. Walker*, 765 F.2d 517 (5th Cir. 1985), *cert. denied*, 474 U.S. 1037, 106 S. Ct. 605 (1985).

The issue of whether or not a particular defendant is a state actor or a local actor is dependent upon an analysis of state law; and this Court defers considerably to a circuit court's expertise in interpreting state law. *Jett v. Dallas Independent School District*, 491 U.S. 701, 109 S. Ct. 2702 (1989). Identifying a particular defendant as a state or a local actor is a question of law that is not a "suitable matter for the jury to decide". *Owens v. Fulton County*, 877 F.2d 947 (11th Cir. 1989).

Before determining that a state common pleas court judge was a "state" actor shielded by Eleventh Amendment immunity, the Sixth Circuit thoroughly analyzed Ohio's applicable statutory and constitutional provisions relating to the creation of the system of common pleas courts, supervisory authority over Ohio courts, the election of judges, jurisdictional concerns, a judge's independent hiring authority and his or her ability to mandamus appropriate funding for court operations. *Mumford II*, at 268, 269, 270. After examining Ohio law, the Sixth Circuit properly determined that:

> . . . an Ohio common pleas court is *not* a segment of county government, but an arm of the state for purposes of section 1983 liability and Eleventh Amendment immunity analyses. Therefore, the instant claim against Basinski in his official capacity as the successor in office to Zieba as Administrative Judge of the Domestic Relations Court cannot stand.

Mumford v. Basinski, 105 F.3d 264 at 269, 270 (6th Cir. 1997). (Emphasis in original). (Footnote omitted).

Ohio law, as expertly interpreted by the Sixth Circuit, is in accord with the prevailing view that judges are state actors for purposes of the Eleventh Amendment and § 1983. *Foster v. Walsh*, 864 F.2d 416 (6th Cir. 1985); *McMillian*, *infra*; *Eggar v. City of Livingston*, 40 F.3d 312 (9th Cir. 1994); *Franceshi v. Schwartz*, 57 F.3d 828 (9th Cir. 1995); *Greater Los Angeles Council On Deafness, Inc. v. Zolin*, 812 F.2d 1103 (9th Cir. 1987); *O'Connor v. Nevada*, 686 F.2d 749 (9th Cir. 1982), *cert. denied*, 459 U.S. 1071, 103 S. Ct. 491 (1982); *Holloway v. Walker*, *supra*; and *Giglio v. Supreme Court of Pennsylvania*, 675 F. Supp. 266 (M.D. Pa. 1987). Eleventh Amendment immunity attaches even though a judge may be acting in an administrative capacity. *Warnock v. Pecos County, Texas*, 88 F.3d 341 (5th Cir. 1996).

Mumford argues that the result below would have differed if the Sixth Circuit would have had the benefit of this Court's guidance in *McMillian v. Monroe County, Alabama*, __ U.S. __, 117 S. Ct. 1734 (1997), wherein this Court held that for Eleventh Amendment immunity purposes, an Alabama county sheriff was a "state" actor for purposes of § 1983. (Petition for Writ of Certiorari, pp. 24, 30). *McMillian* is factually distinguishable

because the "state" actor was a county sheriff, not a state common pleas court judge. *McMillian* is legally distinguishable because this Court interpreted the laws of the State of Alabama, not the laws of the State of Ohio.

Mumford's remaining argument that the Sixth Circuit's state actor conclusion conflicts with other circuits is of no consequence because to the extent that there may be a perceived conflict, this Court has observed that:

> . . . while it might be easier to decide cases arising under Section 1983 and *Monell* if we insisted on a uniform, national characterization for all sheriffs, such a blunderbuss approach would ignore a crucial axiom of our government; the States have wide authority to set up their state and local governments as they wish. Understandably, then, the importance of counties and the nature of county government have varied historically from region to region, and from State to State.

McMillian, __ U.S. at __, 117 S. Ct. at 1741.

Although *Mumford II* antedated *McMillian v. Monroe County, Alabama*, the Sixth Circuit correctly determined that Ohio common pleas court judges are state actors for purposes of § 1983 liability and Eleventh Amendment immunity analyses. Accordingly, there is no reason to review the Sixth Circuit's finding of Eleventh Amendment immunity.

CONCLUSION

This Court's patronage dismissal law is not in need of further clarification or refinement. There are no conflicting circuit court decisions regarding the position of a domestic relations court referee. Since the Sixth Circuit properly determined that the First Amendment does not prohibit a patronage dismissal of a domestic relations court referee employed by a state common pleas court, and that the Eleventh Amendment bars an official capacity claim against an Ohio common pleas court judge, the Petition for [a] Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — MEMORANDUM OF OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION FILED JULY 31, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:96CV2182

Judge John M. Manos

DAVID M. MUMFORD,

Plaintiff,

v.

DAVID A. BASINSKI, et al.,

Defendant.

MEMORANDUM OF OPINION

On October 8, 1996, David M. Mumford, plaintiff, filed the above-captioned action against the Honorable David A. Basinski, Lorain County Common Pleas Court, in both his official and individual capacities, under 42 U.S.C. § 1983, alleging that defendant did not rehire him as a domestic relations court referee because of his political affiliation, which purportedly deprived him of his First Amendment rights. He seeks declaratory relief, reinstatement to his former position with back pay, and $2,000,000 in emotional distress and punitive damages. Jurisdiction is predicated upon 28 U.S.C. § 1331.

Appendix A

On November 18, 1996, defendant filed a motion for summary judgment. On December 17, 1996, plaintiff filed a response. For the following reasons, the motion for summary judgment is GRANTED.

I. FACTS

In 1989, the Honorable Joseph C. Zieba served as the Administrative Judge of the Lorain County Common Pleas Court, Domestic Relations Division. During this term, Zieba terminated plaintiff from his domestic relations referee position.

In 1990 and 1992, plaintiff sent three applications to defendant for reinstatement. He was not rehired. On April 4, 1994, he applied for a position with defendant, who was serving as the administrative judge of the domestic relation court at the time. On April 9, 1994, the court administrator advised plaintiff that he could not be considered for a position with the court due to its nepotism policies.[1]

In September 1994, defendant hired Michael Brosky to fill a newly created part-time referee position. Immediately after Brosky's appointment, plaintiff initiated this action.

II. STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine

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1. At all relevant times, plaintiff's sister, Marilyn Jefferies, was employed by the domestic relations court as a Divorce Visitation/Mediation Investigator.

issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R Civ. P. 56(c).

The party moving for summary judgment bears the initial burden of production under Rule 56. The burden may be satisfied by presenting affirmative evidence that negates an element of the non-movant's claim or by demonstrating "an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

If the movant meets this burden, the non-movant must "set forth the specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The substantive law identifies which specific facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To avoid summary judgment, the non-movant must "make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

"The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 256 (citing *Adickes v. Kress & Co.*, 398 U.S. 144, 158-59 (1970)). However, the non-movant must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "[T]he mere existence of some alleged factual disputes between the parties will not defeat an otherwise properly supported motion" for summary judgment. *Anderson*, 477 U.S. at 247-48

Appendix A

III. ANALYSIS

Plaintiff's claim is time-barred. He was notified in a letter dated April 9, 1994, that he would not be considered for a position with the domestic relations court. The Sixth Circuit has held that "the limitations period starts to run when the plaintiff knows or has reason to know of the injury which is the basis of his action." *Kuhnle Bros. v. County of Geauga*, 103 F.3d 516, 520 (6th Cir. 1997). Therefore the statute of limitations would have started to run in April 1994 and expired in April 1996.[2] This claim is time-barred since it was not filed until October 1996.

Even were the complaint timely filed, defendant is entitled to judgment as a matter of law. The Sixth Circuit has expressly stated that "an Ohio common pleas court is not a segment of a county government, but an arm of the state for purposes of § 1983 liability and Eleventh Amendment immunity analyses." *Mumford v. Basinski*, 105 F.3d 264, 269 (6th Cir. 1997). Therefore, the defendant is entitled to immunity and the claims against him in his official capacity cannot stand.

The *Mumford* court further held that the inherent duties of an Ohio domestic relations court referee are political in character and, therefore, "patronage considerations may justifiably influence or control the court's appointment to that post." *Id.* at 273. The First Amendment as a matter of law does not safeguard such referee positions from patronage considerations. *Id.*

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2. The Sixth Circuit has decided that the limitations period for § 1983 actions arising in Ohio is the two-year period found in Ohio Rev. Code § 2305.10. *Browning v. Pendleton*, 869 F.2d 989 (6th Cir. 1989).

Appendix A

Accordingly, defendant's motion for summary judgment is GRANTED.

IT IS SO ORDERED.

s/ John M. Manos
UNITED STATES DISTRICT JUDGE